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91-1745

Supreme Court, U.S.
FILED
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ELKS NATIONAL FOUNDATION, A LEGAL ENTITY, ET AL.,

PETITIONERS

v.

FRED J. WEBER, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a United States District Court have jurisdiction of a claim under Title 42 U.S.C. §1983 when a state supreme court over objections of lack of due process under the United States Constitution has refused to consider the claim? This question has not been decided by this Court.

2. Should sanctions of $31,531.65 or any penalties, have been assessed against petitioners for presenting the foregoing question to the federal courts?

Parties to the proceeding whose judgment is sought to be reviewed:

Elks National Foundation, a legal entity; Floyd R. Young; Chad Randall Young, by his guardian Sherry L. Young; Joshua Lee Young, by his guardian Sherry L. Young; Michael Edwin Maxwell, by his guardian Shirley G. Johnson; Corinna Nell Maxwell, by her guardian Shirley G. Johnson; Lois E. LaRue Riggins; Sherry L. Young; James Byrd; Joseph Edwin Maxwell, Jr.; Betty Wilson; Mary Jo Byrd; Thomas A. Larson; Gene Huntley and Jef T. Stites,

Petitioners

Defendants and Appellees in the court below: The Honorable Fred J. Weber, in his official capacity as Associate Justice of the Supreme Court of the State of Montana; The Honorable Jean A. Turnage,

in his official capacity as Chief Justice of the Supreme Court of the State of Montana; The Honorable John C. Harrison, in his official capacity as Associate Justice of the Supreme Court of the State of Montana; The Honorable William E. Hunt, in his official capacity as Associate Justice of the Montana Supreme Court; The Honorable Russell C. McDonald, in his official capacity as Associate Justice of the Supreme Court of the State of Montana; The Honorable Leonard H. Langen, in his official capacity as Temporary Associate Justice of the Montana Supreme Court; The Honorable Frank I. Haswell, in his official capacity as Temporary Associate Justice of the Montana Supreme Court; The Honorable Joe L. Hegel, in his official capacity as Judge of the Sixteenth District Court, Fallon County,

Montana; The Honorable Kenneth R. Wilson, in his official capacity as Judge of the Sixteenth District Court, Fallon County, Montana; Continental Oil Company, a corporation; Shell Oil Company, a corporation; Frank Gunnip, Liquidating Trustee of McDonald & Eide, a Delaware Corporation and Robert P. Schwinn,

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JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 29, 1991. A timely petition for rehearing was denied on January 27, 1992. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). This action was brought pursuant to Title 28, U.S.C. §2201 and §2202 and Title 42, U.S.C.

§1983. The federal district court had jurisdiction under Title 28, U.S.C. §1343. The court of appeals had jurisdiction under Title 28 U.S.C. §1291 which gives that court jurisdiction to hear appeals from final decisions of United States District Courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 2, clause 1 of the United States Constitution provides in relevant part that

> The Judicial Power [of the United States shall extend to ... Cases ... [and] to Controversies....

Article IV, section 1 of the United States Constitution provides that

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of

every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Fifth Amendment to the United States Constitution provides in relevant part that

> No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No state shall...deprive any person of life, liberty, or property, without due process of law....

Section 1983 of Title 42 of the

United States Code provides in relevant part that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage - - - subjects, or causes to be subjected, any citizen of the United States or other person within tne jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable - - -

Section 1257 of Title 28 of the United States Code provides in relevant part that

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court...

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> The records and judicial proceedings of any court of any...State, Territory or Possession [of the United States}...shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Section 2201 of Title 28 of the United States Code provides in relevant part that

> In a case of actual controversy within it jurisdiction...any court of the United States...may declare the rights and other legal relations of any interest party....

STATEMENT OF THE CASE

This case concerns an oil and gas lease on the NW¼ of Section 8, Township 7 North, Range 60 East M.P.M. in Fallon County, Montana, dated June 8, 1953. There is no dispute about the landowner's royalty of twelve and one-half percent (12½%) or overriding royalty of three percent (3%). The dispute in this case is concerned solely with the 84-1/2% working interest.[1] Before oil was discovered on the lease H. W. McDonald was assigned the S½ of the lease (S½NW¼) and an undivided one-half interest in the N½NW¼.[2] Mr. McDonald made an agreement with Continental Oil Company to develop that lease and in connection with that agreement assigned to it a one-half in-

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[1] App. p. 93

[2] App. pp. 98-99.

terest in his ownership.[3]

From the language in the assignment it cannot be determined if Mr. McDonald assigned one-half of what he owned in the lease or a one-half interest in it (one-half interest in it, would include all of his one-half interest in the N½ NW¼).[4] After the discovery of oil and before any payments were made under the lease, Continental Oil Company and Mr. McDonald's assigns entered into a separate contract by letter in which they agreed as to how proceeds from the lease would be divided. Mr. McDonald's ratification agreement was dated May 24, 1962, and the separate contract, made after discovery of oil, was July 16, 1964. Pursuant to the sepa-

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[3] App. p. 101.

[4] Copy of Assignment, App.pp. 199-204.

rate, subsequent contract with Continental, payments were made to the McDonald assignees in the shares that had been agreed to until December 18, 1985, over twenty years.[5] From the time oil was found in 1964, Continental was paid one-half of the working interest proceeds of the oil and gas lease, the McDonald assigns received a three-eighths share (one-half of their original three-fourths share), and one-eighth was paid to Frank Gunnip, the Receiver of the McDonald & Eide Corporation. On April 14, 1983, Frank Gunnip and several of his assignees, filed suit against Continental and Shell Oil Company, the operator of the lease (App. p. 97), claiming to be enti-

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[5] App. pp. 106-107. A copy of the letter contract upon which the McDonald assigns rely is found in the Appendix pp. 204-214.

tled to a one-fourth interest in the lease rather than a one-eighth interest. After this suit was filed Continental and Shell Oil Company commenced withholding a one-eighth interest pending resolution of the litigation.[6] Gunnip was eventually successful in his suit and was ordered to receive a one-fourth rather than a one-eighth interest (App. p. 134). The question presented by this situation was from whose share the did the extra one-eighth share come, Continental's or McDonald's? One of Continental's arguments to Gunnip's suit was that it was entitled to one-half interest because of the McDonald assignment. Gunnip said that the McDonald assignment to Continental was irrelevant to his claim and didn't argue it because his predecessor, McDonald and

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[6] App. p. 106.

Eide, Inc., had owned all the lease, had reserved a one-fourth interest in the assignment to McDonald and Continental was McDonald's assignee.[7] In ruling for Gunnip the Montana Supreme Court said:

> "Continental asserts it is entitled to a 50% interest in the N½ of the NW¼ of the Lease under the ratification agreement with McDonald. However, Continental admits in its brief that it did not adopt this position at the time the ratification agreement was executed in 1964; prior to the time judgment no. 4062 was entered, Continental derived a 25% interest in the

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[7] Statement from Gunnip's Brief, App. pp. 222-224.

N½ of the NW¼ from the Eide and Von DeLinde conveyance and a 25% interest under the ratification agreement. Judgment no. 4062 voided the conveyance from M & E to Eide and Von DeLinde in its entirety, thereby eliminating the 25% interest Continental claimed under assignment from Eide and Von DeLinde. Following judgment no. 4062, Continental continued to assert a 50% interest under the ratification agreement with McDonald.

There remain unresolved issues of material fact regarding the interest of Continental. Although McDonald conveyed an 'undivided one-

half interest' in the Lease under the ratification agreement, Continental admits in its brief that it did not treat its 50% interest in the N½ of the NW¼ as being derived solely from McDonald until judgment no. 4062 was entered. In 1964 McDonald assigned undivided interests to Huntley, Iverson, and Larson. Huntley, Iverson and Larson have claimed under this assignment adverse to the interest Continental now claims under the ratification agreement. A trial must be held to assess Continental's interest considering potential application of adverse possession, waiver and

estoppel.

> The court cannot decide Continental's interest under McDonald's ratification agreement without McDonald's assignees before the court. They must be joined on remand." Gunnip, et al v. Continental Oil Company, et al, a corp., S.C.Mt., September 9, 1986, 727 P.2d 1315. (App. pp. 168-169)

The McDonald assignees were not parties to the litigation and had no part in the selection by the Montana Supreme Court of the claims and defenses which they could urge. After remand the McDonald assignees were joined as parties. They proved the contract of July 16, 1964, which had not previously been be-

fore the court. On the basis of that contract the lower court granted summary judgment for the McDonald assigns on the question of ownership.[8] The McDonald assigns did not rely upon nor argue the matters of waiver or adverse possession and argued estoppel only as it related to the contract upon which they relied.

The Montana Supreme Court in the subsequent appeal reversed the lower court. In that appeal process Continental urged that the lower court had erred

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[8] There is some confusing language in the Court of Appeals Opinion. "A Montana district court considered the effect of the ratification agreement, holding that McDonald conveyed only one-half of his interest in the north half to Continental. The Montana Supreme Court affirmed." (App.p.2) The Montana District Court as the opinion recites ruled that McDonald conveyed only one-half of his interest in the north half to Continental. However, the Montana Supreme Court reversed this ruling. App. pp. 99-102.

because it had considered the contract and ruled it binding and did not limit itself to considering waiver, estoppel and adverse possession. The McDonald assigns in their response to that claim argued that the Montana Supreme Court did not have the power under the Constitution to limit the McDonald assigns' claims without a hearing.

> "The first and, we assume, main argument of Continental is that because of this court's ruling the last time it had this case before it the McDonald assignees have no rights at all unless they can prove adverse possession, waiver or estoppel. They didn't prove any of these matters continental argues and thus

must lose its appeal and this case. (Continental's brief pp. 3-7, 38-39).

Continental says this court so limited the rights of the McDonald assignees when they were not before this court, their property rights had not been placed in issue in any court, they had received no hearing and had not been given an opportunity for hearing with respect to Continental's claims against them.

It is fundamental that before a party may be deprived of any rights at all he is entitled to a notice of hearing and hearing before a tribunal having jurisdiction over

him and his property. See 16 Am.Jur.2d, Constitutional Law, §839 and various applicable United States and Montana Constitutional provisions and cases construing them." (App. pp. 219-221).[9]

The Montana Supreme Court after this claim of due process rights ruled that it had, in its previous opinion, limited McDonald assigns' claims to waiver, estoppel and adverse possession and that the lower court had erred in considering the contractual claims of McDonald saying:

"We remanded so that adverse possession, waiver, and

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[9] The opinion of the Court of Appeals says that the matter of constitutionality was raised in the petition for rehearing. It was raised there and also raised as shown here as soon as the conclusiveness of the previous supreme court opinion was claimed.

> estoppel could be considered as theories under which Continental might have subsequently lost or forfeited any portion of its one half interest. The District Court ignored this Court's opinion and reconsidered the effect of the ratification agreement. We therefore grant supervisory control. (App. pp. 131-132)

The Montana Supreme Court, in its opinion, considered the parties, the lower court, and itself bound by the language of the previous decision. It's short discussion of the evidence was preceded by the statement:

> We have considered whether those (evidentiary materials) might support a theory of

adverse possession, waiver, or estoppel against Continental. (App. p. 132)

and ended with this statement:

"We conclude that plaintiffs have failed to present substantial evidence to support a theory of adverse possession, waiver, or estoppel against Continental." (App. p. 134).

Consistent with its ruling that McDonald could present evidence only on adverse possession, waiver and estoppel, the court refused to consider whether the evidence submitted constituted specific, written and enforceable contracts between McDonald and Continental.

The McDonald assigns petitioned the Montana Supreme Court for rehearing set-

ting out the claim they made and the constitutional basis for hearing it:

The memorandum is in pertinent part, as follows:

> "The court's decision strips from the McDonald Assignees property which they and their predecessor, Mr. H.W. McDonald, claimed since Mr. McDonald first received it by assignment from the McDonald & Eide Corporation July 12, 1955. Also, the McDonald Assignees under this claim of title received the income from the property from 1964 until 1984.
>
> Even more importantly, if the McDonald Assignees are obliged to repay the income they received from the property they conceivably could lose

the balance of their property and be in debt as well.

We do not suggest that serious or even catastrophic consequences entitle a litigant to relief. He is entitled as a matter of right and law, however, to claim the tribunal pay careful attention to, and follow the law. This is the claim we are advancing in this petition for rehearing.

This court granted supervisory control because the lower court gave a full hearing (hours of argument and many briefs) to the McDonald Assignees and, after such hearing, ruled in their favor

with thorough and meticulous findings, conclusions and judgment. This court said the lower court should not have fully considered the rights of the McDonald Assignees because by the language in the court's previous opinion the lower court was limited to determining if the McDonald Assignees had rights arising out of adverse possession, waiver or estoppel, and could consider no other claims, rights and defenses of the McDonald Assignees.

In so ruling this court committed grave error.

First of all at the time of the rendition of the

previous opinion the McDonald Assignees were not before this court. This court did not have jurisdiction of them and therefore had no right to in any way limit defenses they might wish to interpose or claims they might wish to make.

Secondly, the legal position of the McDonald Assignees was and is entirely different from that of Gunnip. Gunnip was entitled to prevail, we showed because Continental's title was derived from and inferior to that of Gunnip and because of judgments which Gunnip had obtained. The title of the

McDonald Assignees, on the other hand, depended upon an interpretation of the assignment McDonald gave and subsequent agreements between his assignees and Continental. The briefs that were submitted showed that there was different property, different parties, different evidence and different issues in the claims of the McDonald Assignees as distinguished from the claims of Gunnip.

What this court has done is deprive the McDonald Assignees of a day in court basing such denial upon obiter dicta in a case to which they were strangers.

We are aware that this court in refusing to consider most of the material relied upon by the lower court acted pursuant to the urging of Continental. This urging was briefed by the McDonald Assignees. As there was an issue made of this point in the briefs and as the case turned upon this point we request and we feel, under the circumstances, we are entitled to request, that if this court does not grant a rehearing that it, at a minimum, articulate:

1. Why the McDonald Assignees as a matter of common morality and justice

are not entitled to a hearing with respect to their case and their claims and defenses?

2. How the property of the McDonald Assignees could be stripped from them and their rights jeopardized in a proceeding in which they were neither parties nor participants?

3. Why the U.S. and Montana Constitutions relative to due process and the United States statutes relative to civil rights do not apply?

CONCLUSION

The law, when consulted, leads inexorably to the conclusion that the McDonald Assignees are entitled to keep

the property which they and Mr. McDonald have claimed for 34 years and from which they enjoyed all the income for 20 years. They should be given a rehearing and the law should be followed." (App. pp. 136-143).

This petition of the McDonald assignees was denied without comment (App. pp. 56-57). They then filed suit in the United States District Court for the District of Montana under §1983 of Title 42 asserting their constitutional right to a hearing before deprivation of their property had not been extended to them. The suit was primarily against Continental and Shell Oil Company for damages, costs and attorneys fees and against the Supreme Court Justices and

lower courts in Montana to enjoin enforcement of the Supreme Court's judgment. No fees and costs were claimed against the Judges and Justices. (App. pp. 225-244).

The United States District Court for Montana relying on Section 1257 of Title 28 dismissed the case for lack of subject matter jurisdiction and assessed a penalty against the McDonald assigns in the amount of $23,790.65 either under Section 1988 of Title 28,[10] the Civil Rights Act, or as sanctions under Rule 11, Fed.R.Civ.P. (App. p. 29). The McDonald assigns appealed to the United States Court of Appeals for the Ninth Circuit. That court affirmed the lower court and awarded further sanctions against the McDonald assigns in the

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[10] App. p. 40.

amount of $7,741.00. (App. pp. 19-20)

THE NINTH COURT OF APPEALS HAS MISUNDERSTOOD OUR POSITION.

The Ninth Court of Appeals says in its opinion that the McDonald assignees were in the Court of Appeals arguing the ambiguity of the McDonald assignment, that the Montana Supreme had already decided on that instrument's ambiguity and therefore there was no denial of due process. This finding is based upon a misunderstanding of our position. We nowhere in our brief to the Ninth Court of Appeals argued the word "ambiguity". We argued that the McDonald assignees were entitled to have considered a separate contract between them and Oil Company entered into by them (not Mr. McDonald) two years after the McDonald

agreement. This contract was set out verbatim in the Statement Of The Case to the appellate court. The Court of Appeals like the Montana Supreme Court, completely disregarded this important document. The appellate court said:

> "The McDonald assigns here complain, not of the substantive law applied by the Montana courts, but of the procedure by which the state supreme court reached the ambiguity question." (App. pp. 12-13).

We did not complain about procedure but about the Montana Supreme Court's refusal to consider our evidence of title based upon a binding contract of at least equal legal dignity with the assignment upon which Continental relies. In Gunnip the

Montana Supreme Court said that the McDonald assigns must be joined. When they were joined and showed they relied for title upon entirely different documents than had been before the court previously, the Montana Supreme, nevertheless, hewed to its previous criteria, and, as its opinion clearly shows, refused to even consider the McDonald assigns' claims, to say nothing of "hearing" them or "weighing" them.

Both the Montana Supreme Court and the Ninth Court of Appeals reached their conclusions by turning a blind eye to the legitimate rights and contractual claims of the McDonald assigns.

ARGUMENT

We rely upon the 14th Amendment to the United States Constitution and Title 42 U.S.C. §1983 both of which are noted

at the commencement of this brief.

That contracts may be entered into by letter is basic law. See 17 C.J.S., Contracts, § 57. The contract upon which we rely was not a gloss upon a claim of non-ambiguity. It was a separate contract entered into at a different time from the McDonald assignment with different people, wholly independent of the McDonald assignment and of equal legal dignity. This circumstance, which was brought home fully to both the Montana Supreme Court and the Ninth Court of Appeals was totally ignored by both courts. Neither court mentioned the contract nor the implications which flowed from it. Both of them ignore the thorough investigation by the Montana District Court which ruled that there was a contract and that it was controlling.

See Truax v. Corrigan, 64 L.Ed 254, 27 A.L.R. 375, 257 U.S. 312, 42 S.Ct. Rptr. 124, 129:

"The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

See Board of Regents of State Colleges v. Roth, 92 S.Ct. 2701, 408 U.S. 564, 33 L.Ed. 548:

"And a weighing process has long been a part of any determination of

the *form* of hearing required in particular situations by procedural due process."

See Boddie v. Connecticut, 91 S.Ct. 780, 401 U.S. 371, 28 L.Ed.2d 113:

"...the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals."

In the lower court and here we rely upon the case of Selwin A. Robinson, et al., v. George R. Ariyoshi, et al., 753 F.2d 1468 (9th Cir. 1985) and this Court's management of that case on application for Writ of Certiorari.

The Robinson case, as the case at bar, concerned property rights and a limitation of those rights by a state

supreme court. The property rights were water rights and the problem with respect to them arose when the Hawaiian Supreme Court ruled that it was going to apply the common law of England rather than the law which had been applied previously. After the case was finally decided by the Supreme Court of Hawaii and after certiorari had been refused by the United States Supreme Court the parties adversely affected by the Hawaiian Supreme Court decision sued in Federal District Court for Hawaii because their constitutionally protected property rights had been affected and because the Hawaiian Supreme Court had ignored and refused to pass upon the constitutional claims which they had presented. The Robinson case for practical purposes is identical to the case at bar. The

primary difference between the Robinson case and the case at bar is that in the Robinson case the plaintiffs sued the officials charged with enforcing the law while in the case at bar petitioners sued the supreme court which issued the opinion and the lower court members who were charged with enforcing it. We do not consider this difference to be significant.[11] The Ninth Court of Appeals in the Robinson case, said that, under the circumstances, the federal district court did have subject matter jurisdiction to enjoin the implementation of the Hawaiian Supreme Court decree. It said, in relating pertinent facts:

"The parties adversely

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[11] Courts may be sued for prospective injunctive relief, Pulliam v. Allen, 1983, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565.

affected by the holding in McBryde I petitioned for rehearing and the state supreme court allowed a rehearing on the limited issue of the proper construction of Hawaii Rev. Stat. @ 7-1 (a century-old territorial statute dealing largely with drinking water and rights of way on roads over private lands) and the meaning of the word 'appurtenant.' The parties attempted to enlarge the scope of the rehearing to include state and federal constitutional claims but their attempt was summarily rejected. See Robinson v. Ariyoshi, 441 F. Supp. 559,

564 (D. Hawaii 1977), (Robinson I). Rehearing was denied in McBryde Sugar Co. v. Robinson, 55 Hawaii 260, 517 P.2d 26 (1973) (McBryde II). n2 In due course the Supreme Court of the United States denied review, McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974) (McBryde III), and in 1974 this litigation began in the United States District court for the District of Hawaii. The decision in the district court permanently enjoined the named state officials from enforcing against these plaintiffs any 'new law' announced in McBryde I and II. Robinson I, 441 F. Supp. at

586.

n2 The 'opinion' in McBryde II, apart form formal recitals consists of the following:

> Arguments of the parties were heard at the hearing had on September 18, 1973. After careful consideration of the briefs and arguments presented at the hearing, we find no reason to change the decision filed herein."

After setting forth the facts the court of appeals, in Robinson, ruled as follows:

"Res judicata

With reference to a res judicata bar against these claims, the question becomes more complex. It is settled that "horizontal" appeals will not lie to the United States District Courts to overturn allegedly erroneous decisions on federal constitutional questions by the highest court of a state. Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923). See also District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983). However, Rooker made it clear that the only constitutional questions arising from a state proceeding on

which the Supreme Court considered itself to be the final arbiter, were those that "actually arose in the cause" in which a full hearing was held and where the judgment was responsive to the issues. 263 U.S. at 415. Otherwise, if Rooker were a blanket jurisdictional bar precluding the litigation of claims even if there had been no actual state court opportunity to litigate them, Rooker would swallow the "full and fair opportunity to litigate" limitation to res judicata clearly established elsewhere by the Supreme Court. See e.g., Allen v. McCurry, 449

U.S. 90, 95 (1980).

Consistent with that analysis, we have read Rooker not as a jurisdictional barrier but as an application of res judicata. See e.g., Williams v. Washington, 554 F.2d 369, 371 (9th Cir. 1977); Hutcherson v. Lehtin, 485 F.2d 567, 569 (9th Cir. 1973); Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481, 485 (9th Cir. 1973), cert. denied, 415 U.S. 916 (1974). The Supreme Court, in one of two majority opinions which cited Rooker did so in a discussion of res judicata. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 282-83

(1946). The other, more recent, Supreme Court majority citation of Rooker has been in a jurisdiction context, with acknowledgment of the res judicata implications. Feldman, 460 U.S. at 476. In Feldman, the Supreme Court held that where allegations underlying a state's highest court's final judicial decision are "inextricably intertwined" with issues presented to a federal court, the federal court has no jurisdiction over those issues, even if those challenges included constitutional claims. Id. as [at] 486.

Faced with the task of deciding our

power to review constitutional issues which arise from a state court proceeding, we view the res judicata requirement of full and fair opportunity to liti-gate [litigate], and the Feldman "inextricably intertwined" barrier to federal jurisdiction as two sides of the same coin. Under the rubric of either "jurisdiction" or "res judicata," the crux of the question is whether there has

already been actual consideration of and a decision on the issue presented. If consideration and decision have been accomplished, action in federal court is an impermissible "appeal" from the state court decision. See Reynolds v. Georgia, 640 F.2d 702, 705-06 n.2 (5th Cir.) cert. denied, 454 U.S. 865 (1981). If no consideration has been given, or any decision on the matter is ambiguous,

it is unlikely that the issues presented to the state high court and to the federal court are so "inextricably intertwined" that the federal court cannot take jurisdiction. Nor is it likely that there will have been a full enough and fair enough opportunity for litigation to warrant the claim preclusive effect of res judicata.

Proceeding under the doctrinal umbrella of res judica-

ta, we find that Robinson's due process claims were not and could not have been litigated in the McBryde state proceedings because the Hawaii Supreme Court refused to consider Robinson's federal claims. Robinson I, 441 F. Supp. at 564. In Haring v. Prosie, 462 U.S. 306, 103 S. Ct. 2368, 2373 (1983), the Supreme Court noted that in a @ 1983 action, collateral estoppel effect will not be given to a state court conclusion where the complaining party did not have full and fair opportunity to litigate a claim in state court or where the state court demonstrated

inability or unwillingness to protect federal rights. We do not hesitate to apply the same caveat in this res judicata context. The principle is fully consonant with the philosophy expressed in the Restatement of Judgments which provides for an exception to the general rule of preclusion where "[a] new determination of the issue is warranted by differences in quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them." Restatement (Second) of Judgments @ 28(3).

Turning to ap-

plication of the Feldman doctrine, we cannot see how federal constitutional issues which the state court refused to consider on a petition for rehearing are at all, let alone inextricably, intertwined with a previously reached state court judgment on riparian rights. The Hawaii Supreme Court decision to deny rehearing of the substantive questions of state law may or may not have

been intertwined with its decision also to deny hearing of federal constitutional claims. We are not asked to decide whether the composite denial of rehearing and refusal to hear was correct; the Supreme Court has already declined to review the matter. McBryde III, 417 U.S. 962. We are asked to review district court findings about constitutional claims which themselves

were never decided by a state court, intertwined or otherwise. n3

n3 If the procedural posture of the state court action had, for some reason, altogether prevented the plaintiffs from raising federal constitutional claims in their petition for rehearing, the federal district court would have had original jurisdiction over those claims. Wood v. Orange Coun-

ty, 715 F.2d 1543, 1546-47 (11th Cir. 1983) cert. denied, 104 S. Ct. 2398 (1984). We are loathe to grant less constitutional protection where plaintiffs have responsibly exercised an opportunity to raise their claims and have been turned away from the state tribunal without so much as an explanation. Like the court in Wood, we are concerned that "[s]uch a re-

> sult might deprive [plaintiffs] of any forum, state or federal, where [they have] a reasonable opportunity to present [their] federal constitutional claims, a result arguably contrary to the requirement of due process." Id. at 1547.

Thus we are in no danger of serving impermissibly in an appellate role vis-a-vis the Hawaii state court, or of reopening matters which have been litigated and decided in state court. Where a state

court has refused to entertain federal constitutional claims, a federal court violates the precepts of neither subject matter jurisdiction nor res judicata by hearing those claims."

The defendants in the Robinson case petitioned this Court for Certiorari. Most of their arguments were directed toward the proposition that the Federal District Court of Hawaii did not have jurisdiction. The response of Robinson to those claims was as follows:

"(Ariyoshi, et al.) rely on the cases of *Rooker v. Fidelity Trust Co.*, 263 U.S. 713 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U. S. 462 (1983) as

standing for the proposition that a state supreme court without a hearing can divest property rights to the state without compensation and contrary to proper federal court adjudications, and the only redress a private citizen has is the chance that a petition for certiorari might be granted in this Court. Neither *Rooker* nor *Feldman* require such a result. The Court has often ruled that every litigant should have a full and fair opportunity to litigate his constitutional claims. *See Haring v. Prosise*, 462 U.S. 306 (1983). Certainly the remand in *Feldman* with

instructions to consider Feldman's constitutional challenge to bar admission rules clearly impled that Feldman was entitled to a full and fair opportunity to litigate constitutional questions that might have been raised before the District of Columbia Court of Appeals.

If the federal constitutional claims were not given a full and fair hearing, they were not 'inextricably intertwined' with the *McBryde* judgment so as to bar jurisdiction in the District Court as were certain claims in *Feldman*. Whether *Rooker* and *Feldman* stand for more than an appli-

cation or *res judicata*, they cannot be read to prevent Plaintiffs from having a full and fair opportunity to litigate federal constitutional claims.

The District Court found that Plaintiffs had no hearing on their constitutional claims in the Supreme Court of Hawaii. This finding cannot be refuted. In fact, the State of Hawaii argued in this Court in its Memorandum to Dismiss Appeal in *McBryde*:

> 'Oral argument was duly limited to the issues specified in the Order of June 18, 1973...The *per*

curiam affirmation of the Supreme Court does not mention, discuss or pass upon any Federal questions.'

(Ariyoshi, et al.) argue that because Plaintiffs received four months from the Supreme Court of Hawaii to prepare their petition for rehearing, which petition was summarily denied with respect to Plaintiffs' constitutional claims, Plaintiffs have received due process from the Supreme Court of Hawaii and therefore cannot have any hearing on their federal claims in the United States

District Court. Such an argument seems ludicrous and is contrary to any decisions of this Court. A refusal to grant a hearing is not the equivalent of a full and fair hearing on constitutional issues.

(Robinson, et al.) never had a hearing until the United States District Court heard their case and upheld their federal rights against the unconstitutional claims of the State officials. The United States District Court had jurisdiction to hear such claims and was the only court willing to do so.

Due process requires a

full and fair hearing by an unbiased tribunal. *See Gibson v. Berryhill*, 411 U.S. 564 (1973)....

Even if refusal to grant a rehearing may be considered a hearing on the merits, the District Court had jurisdiction to hear the constitutional claims. Plaintiffs' constitutional claims were not fairly considered by the Supreme Court of Hawaii, and neither *res judicata*, collateral estoppel nor the '*Rooker* doctrine' should bar the hearing of those claims by the federal courts. The rule is clear with respect to collateral estoppel and logically to

other forms of *res judicata*.

> 'Moreover, additional exceptions to collateral estoppel may be warranted in Section 1983 actions in light of the "understanding of Section 1983" that "the federal courts could step in where the state courts were unable or unwilling to protect federal rights.' [*Allen v. McCurry*, 449 U.S. at 96, 66 L.Ed. 308, 101 S.Ct. 441].

Haring v. Prosise,

462 U.S. at 313-314.

As stated in *Allen v. McCurry*, 449 U.S. 90, 95 (1980):

> ...'[O]one general limitation of the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case.'

This Court reiterated in *Kremer v. Chemical Construc-*

tion Corp., 456 U.S. 461 (19-82):

> 'We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue.'

Id. at 480-81.

The District Court had jurisdiction to determine whether Plaintiffs had a full and fair hearing, and *Feldman* and

Rooker cannot be read to deny the District Court's jurisdiction to determine whether or not such a hearing took place. The District court correctly decided that no hearing occurred and decided Plaintiffs' constitutional claims."[12]

This Court in reversing the case did not rule that the federal court did not have jurisdiction but that the judgment of the Hawaiian Supreme Court was not final. 477 U.S. 902, 106 S.Ct. 3269, 91 L.Ed.2d 560.

Neither the Court of Appeals nor the Montana Supreme Court extended to the

---

[12] Brief of Robinson et al. in this Court. (George R. Ariyoshi, Governor, State of Hawaii, et al., v. Selwyn A. Robinson, et al., Supreme Court No. 85-406.)

McDonald assigns a meaningful hearing on their contract claims. That they had a contract is clear. It is also clear that they relied upon and proved it to both courts. Neither court, obviously, gave it any consideration at all. Both courts, apparently, considered it to be some sort of irrelevant gloss to a claim of non-ambiguity.

The McDonald assigns have had no meaningful hearing by the two federal courts and the Montana Supreme Court.

SANCTIONS

The advisory comment to amended Rule 11 F.R.Civ.P under which the District court assessed sanctions reads as follows:

> "The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or

legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on - - -whether the pleading, motion, or other paper was based on a plausible view of the law;

- - -

The word 'sanctions' in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers."

The lower court awarded full attorneys fees on the basis of Title 42 U.S.C. §1988 and Rule 11 Fed.R.Civ.P. A case which has ruled that attorneys fees are

not awarded when a civil rights case is dismissed is Hidhdahl v. Gilpin County Department of Social Services, et al., (USDC Colo. 1988) 699 F.Supp 846, affirmed Court of Appeals 10th (1991) 938 F.2d 1150. Whatever the Court may decide on the merits of this appeal we respectfully suggest the imposition of the enormous sanctions should be reversed.

CONCLUSION

This case concerns an important point of federal law which this Court has not decided. We ask this Court to find that a federal district court does have jurisdiction under Title 42 U.S.C. §1983 when a state supreme court refuses to give a meaningful hearing to a right protected by the United States Constitution.

We ask also that this Court reverse

the sanctions which were imposed.

Respectfully submitted this 27th day of April, 1992.

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Baker, Montana 59313

By _____
Attorney for Petitioners

EDITOR'S NOTE

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91-1745

No. _____

Supreme Court, U.S.
FILED
APR 27 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ELKS NATIONAL FOUNDATION, A LEGAL ENTITY, ET AL.,

PETITIONERS

v.

FRED J. WEBER, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S APPENDIX

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PETITIONER'S APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELKS NATIONAL FOUNDATION, a legal entity, et al.,
Plaintiff-Appellant,

v.

FRED J. WEBER, et al.; SHELL OIL COMPANY; CONTINENTAL OIL COMPANY; ROBERT P. SCHWINN, Individually and as Successor Liquidating Trustee of McDonald & Eide, Inc.,
Defendants-Appellees.

No. 90-35799
D.C. No.
CV-89-62-BLG
OPINION

Appeal from the United States District Court
for the District of Montana
James F. Battin, Chief District Judge, Presiding

Argued and Submitted
July 11, 1991—Seattle, Washington

Filed August 29, 1991

Before: Dorothy W. Nelson, John T. Noonan, Jr. and Thomas G. Nelson, Circuit Judges.

Opinion by Judge T.G. Nelson

SUMMARY

Jurisdiction/Attorneys' Fees

Affirming a district court dismissal of a complaint for lack of subject matter jurisdiction, the court of appeals held that

res judicata foreclosed further consideration of the issue of the ambiguity of an oil and gas lease ratification agreement already considered by the Montana state courts.

The corporate owner of the entire working interest in an oil and gas lease assigned a one-half interest to H.W. McDonald. McDonald did not record his assignment. Meanwhile, a conflicting assignment was made to predecessors of Continental Oil Company, who then assigned a one-half interest to Continental. Since McDonald had already filed a quiet title action against the holders of the conflicting assignment, Continental subsequently persuaded McDonald to sign an agreement ratifying the assignment to Continental of the one-half interest. At the time of the execution of the ratification agreement, McDonald held a 50% interest in the north half and a 100% interest in the south half of the land area in question. A Montana district court considered the effect of the ratification agreement, holding that McDonald conveyed only one-half of his interest in the north half to Continental. The Montana Supreme Court affirmed. The McDonald assignees petitioned for rehearing, contending to have been denied due process under the federal constitution. The Montana Supreme Court denied the petition for rehearing. McDonald assignees did not petition the Supreme Court for certiorari. Rather, McDonald assignees filed suit in federal district court under section 1983 against the justices of the state supreme court and two judges of the state district court, all in their official capacity only, and Continental Oil and Shell Oil Company. The district court dismissed the case for lack of subject matter jurisdiction, and awarded attorneys' fees to the defendants.

[1] The court acknowledged that the Supreme Court is the only federal court authorized to hear appeals from state courts, even if challenges allege that the state court's action was unconstitutional. [2] The McDonald assignees cited only *Robinson v. Ariyoshi* in their attempt to find grounds for subject-matter jurisdiction in the federal district court. However, their reliance on that case was both misplaced and ill-

advised. [3] Here, the Montana Supreme Court heard and decided the issue of the ambiguity of the ratification agreement. Res judicata foreclosed further consideration of this issue unless there had not been a full enough and fair enough opportunity to litigate the issue. It was clear that the McDonald assignees were given an opportunity to litigate the issue and that the Montana Supreme Court considered those arguments. [4] The McDonald assignees had yet another problem with their reliance on *Robinson*. The Supreme Court vacated that decision and remanded for reconsideration in light of a subsequent decision of that court shedding light on the ripeness doctrine. On remand by the appeals court, the district court confirmed its previous decision. On the second appeal, this court remanded with instructions to dismiss the complaint because the case did not present a ripe controversy. [5] The McDonald assignees here complained, not of the substantive law applied by the Montana courts, but of the procedure by which the state supreme court reached the ambiguity question. It was difficult to postulate a situation where the federal issues sought to be asserted were more inextricably intertwined with the state court's decision. [6] Besides, the facts of *Robinson* were distinguishable from the facts of the case at bar. In this case, there was no substantive rule of Montana law at issue that could take property without due process if applied in other cases. If McDonald's assignees were entitled to pursue their claim in federal court, every disappointed litigant in a property dispute would contend in federal court that the state court decision was a taking without due process. McDonald's assignees' sole avenue for redress in the federal system was a petition for a writ of certiorari to the Supreme Court of the United States.

[7] The district court did not abuse its discretion in awarding attorneys' fees to the appellees under section 1988 when the McDonald assignees' complaint was measured against *Robinson*. [8] To avoid any appearance of hastening to conclude that the appeal was frivolous because the district court lacked jurisdiction, the court also examined the merits of the

position the assignees would have had to argue had jurisdiction in the lower court existed. [9] The proceedings before the Montana Supreme Court did not support the contention that the legal issue of the ambiguity of the ratification agreement as to them was not before the district court on remand, in the view of the Montana Supreme Court. [10] The Montana Supreme Court considered their position. The McDonald assignees confused process with result. [11] There was no denial of due process in this case. Not only did the district court lack jurisdiction, the substantive position of the McDonald assignees was devoid of legal merit. Under these circumstances, an award of costs and fees was also appropriate on appeal.

COUNSEL

Frank B. Morrison, Jr., Morrison Law Offices, Helena, Montana; Gene Huntley, Baker, Montana, for the plaintiff-appellant.

Chris Mangen, Jr., Crowley, Haughey, Hanson, Toole & Dietrich, Billings, Montana, for the defendant-appellee Continental Oil Co.; William H. Bellingham, Moulton, Bellingham, Longo & Mather, P.C., Billings, Montana, for the defendant-appellee Shell Oil Co.; Robert C. Smith, Cavan, Smith, Grubbs & Cavan, Billings, Montana, for the defendant-appellee McDonald & Eide, Inc.; Richard Larson, Chronister, Driscoll & Moreen, Helena, Montana, for the defendants-appellees Weber, Turnage, Harrison, Hunt, McDonough, Langen, Haswell, Hegel and Wilson.

OPINION

T.G. NELSON, Circuit Judge:

Appellants here are disappointed litigants in Montana state court litigation who brought this 42 U.S.C. § 1983 action in

federal district court against the justices of the Montana Supreme Court, two Montana district court judges and other parties to the state court case. We affirm the district court's dismissal of the complaint for lack of subject matter jurisdiction and its award of attorneys fees, and award attorneys fees on appeal.

I

Facts and Proceedings Below

This action in the federal courts follows long and colorful litigation in Montana state courts concerning ownership of the working interest in an oil and gas lease in the N1/2 of the NW1/4 of section 8, T7N, R60E, Fallon County, Montana. Details of the basic dispute can be found in the first opinion of the Supreme Court of Montana, *Gunnip v. Continental Oil Co.*, 727 P.2d 1315 (Mont. 1986) (*Gunnip*). It is sufficient to set the stage for resolution of the issues here to say that, in 1955, the corporate owner of the entire working interest in the lease assigned a one-half interest in that portion covering the north 1/2 to H. W. McDonald. McDonald did not record the assignment until 1963. (Appellants here claim as McDonald's assignees and will be referred to as such.) In the meantime, a conflicting assignment was made to predecessors of Continental Oil Company, who then assigned a one-half interest to Continental. Since McDonald had already filed a quiet title action against the holders of the conflicting assignment, in 1962 Continental persuaded McDonald to sign an agreement ratifying the assignment to Continental of the one-half interest. That ratification agreement further provided:

> For the same consideration, the undersigned [McDonald] does hereby transfer, set over and convey unto Continental Oil Company an undivided one-half (1/2) interest in the oil and gas lease above described. . . .

At the time of the execution of the ratification agreement, McDonald held a 50% interest in the north 1/2 and a 100% interest in the south 1/2. The burning question which has occupied the courts of Montana for these many years is whether McDonald transferred 50% of the working interest in the lease, or 50% of only *his share* of the working interest in the lease.

The quiet title action by McDonald proceeded to judgment, as did a separate action filed by the shareholders of the corporate one-time holder of the entire working interest. These decisions created a situation which can be described as unclear.

The Montana state court litigation which immediately preceded this action was filed by non-McDonald assignees against Continental and Shell Oil Company. The McDonald assignees were not parties to the action originally. The Supreme Court of Montana reversed a summary judgment in Continental's favor, holding that unresolved issues of material fact remained regarding the interest of Continental. The court said:

> A trial must be held to assess Continental's interest considering potential application of adverse possession, waiver and estoppel.
>
> The court cannot decide Continental's interest under McDonald's ratification agreement without McDonald's assignees before the court. They must be joined on remand.
>
> Continental's asserted 50% interest in the N1/2 of the Lease must be tested against the interest of McDonald's assignees and their successors in interest. . . .

Gunnip, at 1317.

On remand, the McDonald assignees were joined and designated plaintiffs, and the former plaintiffs were redesignated defendants. The Montana district court considered the effect of the 1962 ratification agreement and ruled that McDonald conveyed only one-half of *his* interest in the north 1/2 to Continental. The Supreme Court of Montana took the case under a writ of supervisory control under Rule 17, M. R. App. P. The court said:

> [S]upervisory control is proper to control the course of litigation when the lower court has made a mistake of law or willfully disregarded the law so that a gross injustice is done and there is no adequate remedy by appeal; also, to prevent extended and needless litigation.

Continental Oil Co. v. Elks National Foundation, 767 P.2d 1324, 1326 (1989).

Concerning the McDonald assignees' position the court said:

> The plaintiffs argue here, as they did before the District Court, that the ratification is ambiguous so that a court must look beyond the four corners of the document to interpret it. The Court was not persuaded by that argument in *Gunnip*, nor is it now.
>
> [In the *Gunnip* decision] this Court recognized that the ratification conveyed an "undivided one-half interest" in the lease. Then, as now, we found no ambiguity in the ratification agreement. We remanded so that adverse possession, waiver, and estoppel could be considered as theories under which Continental might have subsequently lost or forfeited any portion of its one half interest. The District Court ignored this Court's opinion and reconsidered

> the effect of the ratification agreement. We therefore grant supervisory control.
>
> We have considered all materials and evidence submitted by plaintiffs, including copies of certain oil division orders and correspondence between Continental and plaintiffs' attorney. We have considered whether these might support a theory of adverse possession, waiver, or estoppel against Continental. [*Id.* at 1326.]

The McDonald assignees petitioned for rehearing, contending, at least inferentially,[1] to have been denied due process under the Constitution of the United States. The Supreme Court of Montana denied the petition without opinion. The McDonald assignees did not petition the Supreme Court of the United States for *certiorari*.

The McDonald assignees filed suit in the United States District Court for the District of Montana pursuant to 42 U.S.C. § 1983 against the justices of the state supreme court and two judges of the state district court, all in their official capacity only, seeking no damages, fees or costs against any of the judicial officers. They also named Continental Oil Company and Shell Oil Company, among others.

The basis of the action was that the Montana Supreme

---

[1]In the Petition for Rehearing before the Montana Supreme Court, they said:

> [W]e are entitled to request, that if this court does not grant a rehearing that it, at a minimum, articulate:
>
> * * *
>
> 3. Why the U.S. and Montana constitutions relative to due process and the United States statutes relative to civil rights do not apply?

(Appellants' Opening Brief, at 25.)

Court in *Continental Oil* denied them due process of law, and deprived them of property without a hearing under color of state law. They asked for judgment:

> 1. declaring the Supreme Court judgment unconstitutional as to them;
>
> 2. declaring the judgment void as to them;
>
> 3. issuing preliminary and permanent injunctions restraining defendants from enforcing or implementing the judgment;
>
> 4. granting them the relief they were entitled to in the state litigation;
>
> 5. awarding attorneys fees and costs.

The federal district court dismissed the case for lack of subject matter jurisdiction, and awarded attorneys fees to the defendants pursuant to 42 U.S.C. § 1988 and, alternatively, under Rule 11, FED. R. CIV. P.

II

Standard of Review

We review the existence of subject matter jurisdiction *de novo*, *Kruso v. IT&T Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, _ U.S. _, 110 S. Ct. 3217 (1990), and awards of attorneys fees under 42 U.S.C. § 1988 for abuse of discretion, *Cunningham v. County of Los Angeles*, 879 F.2d 481, 483 (9th Cir. 1989), *cert. denied*, _ U.S. _, 110 S. Ct. 757 (1990), as we do Rule 11 sanctions. *Cooter & Gell v. Hartmax Corp.*, _ U.S. _, 110 S. Ct. 2447 (1990).

III

Subject Matter Jurisdiction

[1] The Supreme Court of the United States is the only federal court authorized to hear appeals from state courts.[2] In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), the Supreme Court said:

> [United States District Courts] do not have jurisdiction ... over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this Court.

460 U.S. at 486.

[2] The McDonald assignees cite only *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986), (*Robinson I*), in their attempt to find grounds for subject-matter jurisdiction in the federal district court. Their reliance on that case is both misplaced and ill-advised.

The *Robinson* case arose out of a decision of the Supreme Court of Hawaii which *sua sponte* overruled territorial cases dealing with diversion and use of water. *McBryde Sugar Co.*

---

[2]28 U.S.C. § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statue of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statues of, or any commission held or authority exercised under, the United States.

v. Robinson, 504 P.2d 1330, 1344 (1973), *cert. denied*, 417 U.S. 976, *appeal dismissed*, 417 U.S. 962 (1974). The *McBryde* decision had potential impact not only on the parties to the litigation but on every water user in Hawaii. The parties adversely affected by the decision petitioned the Hawaii Supreme Court for rehearing attempting to assert state and federal constitutional claims which arose as a result of the opinion. The state supreme court denied the petition without opinion or hearing.

Following denial of certiorari by the Supreme Court of the United States, (417 U.S. 962 (1974)) Robinson filed suit in the federal district court. In *Robinson I*, this court analyzed the bar to federal court jurisdiction under *Feldman* as essentially calling for a res judicata analysis on whether an issue has been considered and decided in the state courts.

In *Robinson I*, the court said that the

> crux of the question is whether there has already been actual consideration of and a decision on the issue presented. If consideration and decision have been accomplished, action in federal court is an impermissible "appeal" from the state court decision. [Citations omitted.] If no consideration has been given, or any decision on the matter is ambiguous, it is unlikely that the issues presented to the state high court and the federal court are so "inextricably intertwined" that the federal court cannot take jurisdiction. Nor is it likely that there will have been a full enough and fair enough opportunity for litigation to warrant the claim preclusive effect of res judicata.

753 F.2d at 1472.

[3] The Montana Supreme Court did hear and decide the issue of the ambiguity of the ratification agreement. Res judicata forecloses further consideration of this issue unless there

was not a "full enough and fair enough" opportunity to litigate the issue. It is clear that the McDonald assignees were given an opportunity to litigate the issue *and* that the Montana Supreme Court considered those arguments. (*See* Part IV B, *infra*.) The McDonald assignees have no defense against the assertion that their arguments on the ambiguity of the ratification agreement were presented to, and considered by, the state courts. Thus, the McDonald assignees' reliance on *Robinson I* is ill-advised because any res judicata analysis, no matter how myopic, will readily disclose that the Montana courts have decided and re-decided the issue of the quality and quantity of appellants' interests in the lease, and that the McDonald assignees were afforded a full and fair opportunity to be heard.

[4] The McDonald assignees have yet another problem with their reliance on *Robinson I*. The Supreme Court vacated the decision and remanded for reconsideration in light of a subsequent decision of that Court shedding light on the ripeness doctrine. On remand by this court, the district court confirmed its previous decision. On the second appeal, this court remanded with instructions to dismiss the complaint because the case did not present a ripe controversy (*Robinson II*, 887 F.2d 215 (1989)).

[5] Even if we assume for purposes of discussion that it is fair to discuss *Robinson I* without mentioning its subsequent history, as the McDonald assignees have, they do not benefit from the decision. *Robinson I* analyzed *Feldman* as follows:

> In *Feldman*, the Supreme Court held that where allegations underlying a state's highest court's final judicial decisions are "inextricably intertwined" with issues presented to a federal court, the federal court has no jurisdiction over those issues even if those challenges included constitutional claims.

753 F.2d at 1472 (citations omitted). The McDonald assigns here complain, not of the substantive law applied by the Mon-

tana courts, but of the procedure by which the state supreme court reached the ambiguity question. It is difficult to postulate a situation where the federal issues sought to be asserted are more "inextricably intertwined" with the state court's decision.

[6] Finally, the facts of *Robinson I* are distinguishable from the facts of this case. The state court there issued a decision which allegedly overturned the existing state water rights system. It was the imposition of the new substantive rule that gave rise to the claims of a taking without due process in *Robinson I*.[3] The relief granted by the federal district court which was the subject of the appeal in *Robinson I* was an injunction against applying the new law announced in *McBryde*. In *Continental Oil* and *Gunnip*, the state court applied well-polished rules of Montana law that unambiguous written instruments do not need interpretation.[4] In this case, there is no new substantive rule of Montana law at issue which could take property without due process if applied in other cases. It is only the specific result in *Continental Oil* which the McDonald assignees have challenged in federal court. If McDonald's assignees were entitled to pursue their claim in federal court, every disappointed litigant in a property dispute would contend in federal court that the state court decision constituted a taking without due process. *Robinson I* provides appellants no method for obtaining federal jurisdiction over their claim. McDonald's assignees' sole avenue for redress in the federal system was a petition for a writ of *certiorari* to the Supreme Court of the United States.

---

[3]The court stated the main issue to be: "Can the state, by a judicial decision which creates major changes in property law, divest property interests?" *Robinson I*, 753 F.2d at 1471.

[4]Montana has a number of statutes relating to interpretation of documents. *See* §§ 28-3-303, 28-3-401, 70-20-202, Montana Code Annotated. In Montana, whether ambiguity exists is a question of law for the court. *See Monte Vista Co. v. Anaconda Co.*, 755 P.2d 1358 (Mont. 1988) (collecting cases).

IV

Attorneys Fees

A. *In the district court.*

[7] The district court awarded attorney fees under 42 U.S.C. § 1988, and alternatively, under Rule 11. This court has said that fees may be awarded against an unsuccessful plaintiff under section 1988 only if the action is "meritless, in the sense it is groundless or without foundation." *Mitchell v. Los Angeles Community College District,* 861 F.2d 198, 202 (1988), *cert. denied,* 490 U.S. 1081 (1989). The district court's decision under this standard is reviewed for abuse of discretion. When the McDonald assignees' complaint is measured against *Robinson I,* the only authority they cited here, it is clear that the district court did not abuse its discretion in awarding attorneys fees to appellees.

B. *On appeal.*

Even though a district court's award of attorneys fees to defendants under 42 U.S.C. § 1988 is upheld on appeal, it does not necessarily follow that fees will be awarded on appeal. *See, e.g., Price v. Hawaii,* _ F.2d _, Nos. 90-15117 and 90-15863 (9th Cir., July 11, 1991). The standard for award of attorneys fees on appeal is the same as in the district court, *United States ex rel. Chunie v. Ringrose,* 788 F.2d 638, 647 (9th Cir.), *cert. denied,* 479 U.S. 1009 (1986), and this court will exercise its own discretion in determining whether to award attorneys fees on appeal. *Id.* The lack of jurisdiction of the district court is apparent. However, the McDonald assignees have come here, represented by the retired justice of the Montana Supreme Court who wrote the *Gunnip* decision, to argue forcefully that jurisdiction existed in the district court and that they are entitled to the relief they seek.

[8] In order to avoid any appearance of hastening to conclude that the appeal was frivolous because the district court

lacked jurisdiction, we have also examined the merits of the position the McDonald assignees would have had to argue if jurisdiction had existed in the lower federal courts. In doing so, we assume for purposes of the discussion that appellants would not have tried to go beyond the record we now have. The res judicata and "inextricably intertwined" problems apparent on this record would only worsen if further inquiry were made into the proceedings held in the Montana state courts.

The McDonald assignees' claims raise basically a denial of procedural due process. They contend that the legal issue of the ambiguity of the ratification agreement as to them was not before the district court on remand, in the view of the Montana Supreme Court. Therefore, they argue, they were denied an opportunity to be heard on that issue.

[9] The proceedings before the Montana Supreme Court do not support this contention. The McDonald assignees briefed the ambiguity issue, orally argued before that court, and, at oral argument, supported Continental's request for determination of Continental's interest in the N1/2. *Continental Oil*, 767 P.2d at 1325.

[10] Due process requires an opportunity to be heard in a meaningful manner at a meaningful time. *Parratt v. Taylor*, 451 U.S. 527, 540 (1981), *rev'd on other grounds*, 474 U.S. 327 (1985). It is clear beyond argument that the McDonald assignees were afforded a meaningful opportunity to be heard before the Supreme Court of Montana on the purely legal issue of the facial ambiguity of the ratification agreement. Even though that court maintained its view of the ambiguity of the ratification agreement expressed in *Gunnip*, decided at a time when the McDonald assignees were not parties to the case, they had an opportunity to brief and argue their position in *Continental Oil*. The court specifically considered their position: "The plaintiffs argue *here* . . . that the ratification agreement is ambiguous. . . . The Court was not persuaded by

that argument in *Gunnip*, nor is it *now*." *Continental Oil*, 767 P.2d at 1326 (emphasis supplied). In addition, as noted before, they joined with Continental in the supervisory control proceedings in urging the Montana Supreme Court to decide the question of Continental's interest in the lease. Apparently they thought at that time the court had everything before it that it needed to decide the issue. The McDonald assignees confuse process with result.

[11] No denial of due process is shown by the record in this case. The district court not only lacked jurisdiction, the substantive position of the McDonald assignees is devoid of legal merit. Under these circumstances, an award of attorneys fees and costs on appeal is appropriate.

CONCLUSION

The judgment of the district court is AFFIRMED. Attorneys fees and costs on appeal are awarded to appellees.

PRINTED FOR
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FILED
JAN 27 1992
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELKS NATIONAL FOUNDATION, a legal entity, et al.,	)	No. 90-35799
v.	)	D.C. No. CV-89-62 BLG
FRED J. WEBER, et al.;	)	
Defendants-Appellees.	)	ORDER

Before: D.W. NELSON, NOONAN and T.G. NELSON, Circuit Judges.

Appellant's petition for rehearing is denied.

FILED
MAR 20 1992
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELKS NATIONAL FOUNDATION, a legal entity, et al.,	No. 90-35799
v.	D.C. No. CV-89-62 BLG
FRED J. WEBER, et al.;	
Defendants-Appellees.	ORDER

Before: D.W. NELSON, NOONAN and T.G. NELSON, Circuit Judges.

After considering the applications for attorneys fees and the objections thereto, the court has decided to award costs and a portion of the claimed fees as a deterrent to subsequent abuses, pursuant to Federal rules of Appellate Procedure, Rule 38.

Appellees Weber, et al, Appellee Continental Oil company, and Appellee Shell Oil company are hereby awarded $2,000 plus costs, collectively as to Appellees Weber, et al., and individually as to each Continental Oil company and Shell Oil Company, for a total of $6,000 plus costs.

FILED
APR 16, 1992
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELKS NATIONAL FOUNDATION, a legal entity, et al.,	)	No. 90-35799
v.	)	D.C. No. CV-89-62 BLG
FRED J. WEBER, et al.;	)	
Defendants-Appellees.	)	ORDER

Before: D.W. NELSON, NOONAN and T.G. NELSON, Circuit Judges.

Appellant Schwinn's motion for clarification is GRANTED. Appellant Schwinn, and his successors, are awarded attorneys fees in the amount of $1,741, plus costs.

FILED
AUG 15 1990
LOU ALEKSICH, JR., Clerk
By Sandra L. Studiner
Deputy

UNITED STATES DISTRICT COURT

_____DISTRICT OF MONTANA - Billings Division

ELKS NATIONAL FOUNDATION et al.

Plaintiffs

V.

THE HONORABLE FRED J. WEBER et al.

Defendants

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV 89-62-BLG JFB

___ Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_x_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT FINAL JUDGMENT IS ENTERED PURSUANT TO THE COURT'S ORDERS OF JULY 17, 1990 (MOTIONS FOR SUMMARY JUDGMENT OR DEFENDANT SCHWINN WERE GRANTED); NOVEMBER 17, 1989 (PLAINTIFF'S MOTION TO AMEND THE ORDER OF 10-12-89 WAS DENIED); AND OCTOBER 12, 1989 (MOTIONS TO DISMISS OF DEFENDANTS CONTINENTAL OIL COMPANY AND SHELL OIL COMPANY WERE GRANTED, AND THE MOTION FOR SUMMARY JUDGMENT OF THE STATE COURT JUDGES WAS GRANTED).

AUGUST 15, 1990 LOU ALEKSICH, JR.
Clerk

s\ Sandra L. Studiner
(By) Deputy Clerk

FILED
AUG 15 1990
LOU ALEKSICH, JR., Clerk
By s\ Sandra L. Studiner
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

ELKS NATIONAL FOUNDATION, a legal entity; et al.,	Cause No. CV 89-62 BLG JFB
Plaintiffs,	
vs.	ORDER
The Honorable FRED J. WEBER, et al.,	
Defendants.	

On July 17, 1990, this Court granted summary judgment in favor of defendant Robert P. Schwinn, individually and as successor liquidating trustee of McDonald & Eide, Inc.. In that Order, the Court also awarded attorneys fees to defendant Schwinn, pursuant to 42 U.S.C. §1988.

Defendant Schwinn has submitted documentation in support of his request for attorneys fees. Plaintiff has not challenged the reasonableness of the amount sought, and the Court finds that it is reasonable in light of the principals set forth in Blum v. Stenson, 465 U.S. 886 (1984) and Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975). Specifically, 11.5 hours was reasonably spent in defense of the claims to date, as itemized in Exhibit A to the affidavit of Robert C. Smith. The hourly rate of $135.00 per hour is reasonable for one of Mr. Sandall's background and expertise. Accordingly,

IT IS ORDERED that defendant Robert P. Schwinn, individually and as successor liquidating trustee of McDonald & Eide, Inc., is granted an award of attorneys

fees in the amount of $1,518.00. The Clerk is directed to enter a final judgment in this matter, pursuant to this Order, and the Court's prior Orders of July 17, 1990, November 17, 1989 and October 12, 1989.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 15th day of August, 1990.

s\ James F. Battin
Senior U. S. District Judge

FILED
JUL 17 1990
LOU ALEKSICH, JR., Clerk
By s\ Sandra L. Studiner
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

ELKS NATIONAL FOUNDATION, a legal entity; et al., Plaintiffs, vs. The Honorable FRED J. WEBER, et al., Defendants.	Cause No. CV 89-62 BLG JFB

MEMORANDUM AND ORDER

Presently pending before the court are the Motions for Summary Judgment of defendant Robert P. Schwinn, individually as successor liquidating trustee of McDonald & Eide, Inc., a Delaware corporation. For the reasons stated below,

the motions are granted with respect to defendant Schwinn in both of his capacities.

Defendant Schwinn was joined in this action as a nominal or formal party, "so that the entire ownership of the lease may be before the court and in the event [his] presence may later be necessary for full resolution of all disputes. No damages, fees or costs are claimed against [him]." See, Complaint, page 4, para. VII. On October 20, 1989, Schwinn filed the present Motions for Summary Judgment, on the grounds that summary judgment has been granted in favor of all other defendants, and the same defenses raised by those defendants are equally applicable to him. Defendants' motions were supported by a brief, as required under Local Rule 220-1 of this Court. No

response brief has been filed by plaintiffs as of this date. Failure to file a response brief within the prescribed time subjects a motion to summary ruling, and is further deemed an admission that, in the opinion of counsel, the motion is well taken. Having considered the present Motions for Summary Judgment submitted by defendant Schwinn, and being advised in their premises, the court concludes that summary judgment is properly granted.

Also pending before the court are the applications of defendants Shell Oil Co. and Continental Oil Co., as well as the defendant state judges, for awards of attorneys fees in this matter. On October 12, 1989, this Court entered an order granting the motions to dismiss of defendants Continental and Shell, and the

motion for summary judgment of the state court judges. In that same order, the Court denied accompanying requests for attorneys fees by those defendants. The Court subsequently had an opportunity to reconsider its decision with respect to the award of attorneys fees, and on November 17, 1989 reversed its prior decision. In that order, the Court ruled that defendants are entitled to an award of reasonable attorneys fees under 28 U.S.C. §1988 and Rule 11, Fed.R.Civ.P., based upon the meritless nature of plaintiffs' claims. Defendants have submitted proper applications for attorneys fees, accompanied by supporting documentation. Plaintiff has not challenged the reasonableness of the amounts sought, and the Court finds that they are reasonable, in light of the principles set forth in Blum

v. Stenson, 465 U.S. 886 (1984) and Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975). Accordingly, attorneys fees and costs shall be awarded to defendants in an amount to be set forth below. Additionally, defendant Schwinn joined in the arguments and contentions made by the other defendants, and is equally entitled to an award of attorneys fees for the same reasons as set forth in the Court's Memorandum and Order of November 17, 1989.

Based on the foregoing,

IT IS ORDERED that the Motions for Summary Judgment of defendant Robert P. Schwinn, individually and as successor liquidating trustee of McDonald & Eide, Inc., are granted.

IT IS FURTHER ORDERED that the defendant state court judges are entitled

to an award of attorneys fees in the amount of $4,303.00 and costs of $421.00; defendant Continental Oil Co. is entitled to an award of attorneys fees in the amount of $8,258.00; and defendant Shell Oil co. is entitled to an award of attorneys fees in the amount of $9,163.50, with costs of $127.15. The Clerk is directed not to enter judgment until further ordered by the Court.

IT IS FURTHER ORDERED that defendant Schwinn shall submit his application for an award of attorneys fees, along with supporting documentation, on or before July 30, 1990. Plaintiff shall have ten (10) days thereafter to file any objection to the amount sought, at which time a final award will be made and judgment entered in this matter.

The Clerk is directed forthwith to

notify counsel for the respective parties of the making of this order.

Done and dated this 17th day of July, 1990.

s\ James F. Battin
Senior U. S. District Judge

FILED
NOV 17 1989
LOU ALEKSICH, JR., Clerk
By s\ Rayna M. Spadona
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

ELKS NATIONAL FOUNDATION, a legal entity; et al.,	) Cause No. CV 89-62 BLG JFB
Plaintiffs,	)
vs.	)
The Honorable FRED J. WEBER, et al.,	)
Defendants.	)

MEMORANDUM AND ORDER

This case is before the Court on plaintiffs' Motion to Amend the Order of October 12, 1989 wherein the Motions to Dismiss of Continental Oil Company and Shell Oil Company were granted, and the Motion for Summary Judgment of the defendant

State Court Judges was granted. For the reasons stated below, plaintiffs' motion is denied.

FACTS AND PROCEDURAL BACKGROUND

Plaintiffs filed this case on April 24, 1989 seeking a declaratory ruling that a decision of the Montana Supreme Court issued on January 25, 1989, Continental Oil company v. Elks National Foundation, ___ Mont. ____, 767 P.2d 1324 (1989), is unconstitutional as being in violation of due process of law. Plaintiffs further ask that this Court declare that judgment void and issue preliminary and permanent injunctions restraining the defendant State District court Judges from enforcing or in anyway implementing the judgment. Finally, plaintiffs ask the court to grant them the relief which they sought in the state court proceed-

ings against defendants Continental Oil company (Continental) and Shell Oil Company (Shell).

On May 26, 1989, both Continental and Shell filed Motions to Dismiss the action, on numerous grounds. Primarily those defendants raised jurisdictional challenges to this Court's consideration of the matter, arguing that plaintiffs essentially seek appellate review of the Montana Supreme Court ruling and that such relief is not available in this Court. The defendant State Court Judges have also filed a Motion for Summary Judgment raising that same issue, as well as others.

The motions to dismiss and for summary judgment filed by defendants were supported by briefs within the time period prescribed by Local Rule 220-1 of this

Court. Plaintiffs obtained an extension of time until July 12, 1989 within which to respond to those motions. On July 13, 1989, plaintiffs filed what was denominated as an Application for Stay of These Proceedings Pending Application by Plaintiffs for a Writ of Certiorari to the Supreme Court of the United States. On that same date, plaintiffs filed a memorandum in support of their motion to stay these proceedings, and also indicated that that memorandum was to serve as a response to the motions previously filed by the defendants. However, upon review of the memorandum filed by plaintiffs the Court determined that they had failed to address a compelling ground for dismissal or summary judgment, which is this Court's lack of subject matter jurisdiction to conduct review of state court

proceedings, even when constitutional violations are involved. Based upon plaintiff's failure to brief and issues and finding that the arguments advanced by defendants were meritorious, this Court entered an Order on October 12, 1989, granting defendants' motions.

Plaintiffs now move the court to amend its Order of October 12, 1989, to provide for dismissal without prejudice or to dispose of their claims on the merits rather than for simple failure to brief. According to the affidavit of Gene Huntley, counsel for plaintiffs, the merits of the case have been fully addressed in the memorandum in support of their Application for Stay, as well as the reply memorandum thereto, and consideration of the merits ought to be reflected in any decision disposing of the

case. Defendants oppose amendment of the Order, arguing that this Court has already considered the merits of the case in reaching its previous order, and that this most recent motion of plaintiffs is yet another attempt to "[drag] this case on" and "[avoid] any final disposition".

Although plaintiffs have now requested a hearing on the merits of the case, they did not do so prior to the original ruling on the motions, but only after seeking reconsideration. Because no hearing was requested, and because the court believes that the issues raised may be disposed of by an order clarifying the October 12, 1989 Order, plaintiffs' Motion to Amend will be ruled upon without the necessity of oral argument, after careful consideration of the briefs submitted by counsel.

DISCUSSION

The procedural posture of this case has been unnecessarily complicated by plaintiffs' failure to properly distinguish between and address the issues raised by the parties. Defendants filed motions to dismiss and for summary judgment based upon specific grounds, including lack of subject matter jurisdiction. Rather than responding to those specific issues, plaintiff filed its own Application for Stay, intertwining their arguments on the merits of defendants' motions with their own arguments in support of a stay. Although the memorandum was denominated as being "in response to the motions filed herein by opposing parties", the Court found no meaningful discussion in it concerning the jurisdiction of this Court over what is essen-

tially an appeal from a decision of the highest state court in Montana. For that reason, the Court concluded that plaintiffs had failed to file a brief on these issues, as required by Local Rule 220-1 of this court, and submitted the case for summary ruling.

Having considered the merits of the defendants' motions, the court was satisfied that the case is properly dismissed or judgment entered in favor of the defendants. Title 28 U.S.C. §1257 provides in pertinent part, as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where... any title, right, privilege, or

immunity is specially set up of claimed under the Constitution...[of] the United States.

28 U.S.C. §1257. This statute has been construed as meaning that judgments by the highest court of a state can only be reviewed by the United States Supreme Court. See Rothstein v. Montana Supreme Court, 638 F.supp. 1311, 1313 (D.Mont. 1986) (citing District of Columbia court of Appeals v. Feldman, 460 U.S. 462 (1983)); see also Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). When a case, otherwise denominated as a civil rights action under §1983, is in reality an attempt to obtain federal review of a state court decision, the federal court has no subject matter jurisdiction to entertain the claims. See Anderson v. State of Colorado, 793 F.2d 262, 263

(10th Cir. 1986); Reynolds v. State of Georgia, 640 F.2d 702 (5th Cir. 1981). Such is the case here. Plaintiffs allege that the defendant judges deprived them of a one-eighth interest in a producing oil and gas lease, without due process of law. While the court questions whether there was indeed any deprivation of that property interest without due process, it may not make that determination since the proper place for review of the State court's ruling is the United States Supreme Court and not this Court. See Country Club Tower Corp. v. Tower Management Corp., 275 F.Supp. 468, 470 (D.Mont. 1967) (citing Armstrong v. Manzo, 830 U.S. 545 (1965)). Plaintiffs may not circumvent that established principle by characterizing the ruling as a civil rights violation under §1983 in an at-

tempt to obtain a different result. for that reason, the complaint herein is subject to dismissal for lack of subject matter jurisdiction, and the court hereby affirms its prior Order granting dismissal and summary judgment on that basis. However, the Clerk is still directed not to enter judgment until all claims against all parties have been resolved, pursuant to Rule 54(b).

As a final matter, defendant Shell asks the Court to reconsider its denial of attorneys fees under 42 U.S.C. §1988. Having done so, the Court concludes that attorneys fees are properly awarded, and reverses its prior ruling to the contrary. It is true that defendants are to be awarded attorneys fees in civil rights cases only in exceptional cases, as where the action is "meritless in the sense

that it is groundless or without foundation" Mitchell v. Los Angeles community College District, 861 F.2d 198, 202 (9th Cir. 1988) (citations omitted). However, the Court believes that this case meets those requirements. clear precedent from the United States Supreme Court and others establishes this Court's lack of subject matter jurisdiction over a case which seeks relief in the nature of appellate review of a state court decision. Feldman, 460 U.S. 462; Rooker, 263 U.S. 413; Worldwide Church of God v. McNair, 805 F.2d 888 (9th Cir. 1986); Rothstein, 638 F. supp. 1311. As such, it cannot be said that plaintiffs' action is well grounded in the law, and attorney fees are awarded to defendants under 28 U.S.C.

§1988, as prevailing parties in this matter.[1]

Based on the foregoing,

IT IS ORDERED that plaintiffs' Motion to Amend the Order of October 12, 1989 be and his hereby denied.

IT IS FURTHER ORDERED that defendants are entitled to an award of reasonable attorneys fees under 28 U.S.C. §1988, upon proper application therefor.

The Clerk of directed forthwith to

---

[1] The Court recognizes that there is some authority for the proposition that, having dismissed the case for lack of jurisdiction the court never reached the merits of the case and thus defendants cannot be said to have prevailed on the merits, a prerequisite to an award under §1988. See Sellers v. Local 1598, District council 88, 614 F. supp. 141, 143 D.Pa. 1985). However, the facts supporting an award of fees under §1988 also support an award of reasonable attorney fees as a sanction under rule 11, Fed.R.Civ.P., and the court relies on that Rule as an alternative basis for the award of fees. See Hale v. Harney, 786 F.2d 688, 692 (5th Cir. 1986).

notify counsel for the respective parties of the making of this order.

Done and dated this 17th day of November, 1989.

s\ James F. Battin
Chief Judge

FILED
OCT 12 1989
LOU ALEKSICH, JR., Clerk
By Sandra L. Studiner
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

ELKS NATIONAL FOUNDATION, a legal entity; et al.,	) Cause No. CV 89-62 BLG JFB
Plaintiffs,	)
vs.	) ORDER
The Honorable FRED J. WEBER, et al.,	)
Defendants.	)

On May 26, 1989, defendants Continental Oil Company and Shell Oil Company filed their separate Motions to Dismiss and for Attorneys Fees, accompanied by supporting briefs. On June 15, 1989, the defendant state court judges filed a Motion for Summary Judgment, also accompanied by a supporting brief. Under

Local Rule 220-1 of this Court, plaintiff had ten (10) days within which to serve and file an answer brief to each of the motions. No such briefs have been filed as of this date. Failure to file briefs within the prescribed time may subject a motion to summary ruling, and is deemed an admission that, in the opinion of counsel, the motion is well taken. Having considered the Motions to Dismiss and for Summary Judgment submitted by defendants, and being advised in their premises,

IT IS ORDERED that the Motions to Dismiss of defendants Continental Oil Company and Shell Oil Company be and are hereby granted, and the requests for attorneys fees are denied.

IT IS FURTHER ORDERED that the Motion for Summary Judgment of the defen-

dant state court judges be and is hereby granted, and the request for attorneys fees is denied. The Clerk is directed not to enter judgment until all claims against all parties have been resolved, pursuant to Rule 54(b) Red.R.Civ.P..

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 12th day of October, 1989.

s\ James F. Battin
Chief Judge

FILED
SEP 7, 1989
LOU ALEKSICH, JR. Clerk
By s\ Rayna M. Spadona
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

ELKS NATIONAL FOUNDATION, a legal entity; et al.,	)	Cause No. CV-89-62-BLG-JFB
Plaintiffs,	)	
vs.	)	MEMORANDUM AND ORDER
The Honorable FRED J. WEBER, et al.,	)	**********
Defendants.	)	

Presently pending before the Court is plaintiffs' motion to stay proceedings pending application to the United States Supreme Court for a writ of certiorari. Upon careful consideration of the extensive briefs submitted and oral argument presented by counsel for the respective parties, the undersigned is prepared to

rule.

BACKGROUND

The companion state court case has a lengthy history predating the case before this Court. The original complaint was filed in state district court (hereafter "state case") in April of 1983, and presently is in its third amendment. The state case has been appealed to the Montana Supreme Court twice and, in the most recent appeal, the Montana Supreme Court decided the working interest ownership of an oil and gas lease insofar as it covers the N-1/2 NW-1/4 of Section 8-7 N-60F, Fallon County. Continental Oil Company v. Elks National Foundation, et al., _____ Mont. _____, 767 P.2d 1324 (1989).

The Montana Supreme Court, in Continental, held that Continental Oil company owned the contested working interest

involved and that the plaintiffs in the case (the same as in the case before this Court) owned no interest. The Montana Supreme Court then remanded the case to the district court "for entry of judgment establishing the ownership of the working interest in the N-1/2 NW-1/4 and for such other proceedings as are necessary in conformity with this opinion." Continental, at 1327.

On April 18, 1989, the same plaintiffs as in the state case brought the present civil rights action in this Court under 42 U.S.C. § 1983. Plaintiffs allege that the Montana Supreme Court divested them of important property rights without granting them a hearing.

DISCUSSION

In the present case, this Court is requested to stay proceedings in the 42

U.S.C. § 1983 action while plaintiffs make application to the United States Supreme Court for a writ of certiorari. Plaintiffs have submitted extensive briefs, much of the contents of which go to the merits of the underlying case, and allege that economy to both the Court and the parties will result from a stay of proceedings. This Court cannot adopt such conclusions for the following reasons.

First, the Court finds plaintiffs' motion inappropriate due to the untimeliness of an application for writ of certiorari. If the judgment from which plaintiffs seek such a writ is a "final" one, then the time in which an application for a writ of certiorari may be made is long passed. Title 28, §§ 1257(a) and 2101(c) make it clear that any applica-

tion for a writ of certiorari shall be applied for within 90 days after the entry of a final judgment or decree rendered by the highest court of a state. If, in fact, the April 1989 judgment of the Montana Supreme Court is "final," then the plaintiffs have simply allowed their application deadline to pass. This Court will not issue a stay in order to preserve a course that appears doomed from the start.

If, on the other hand, as plaintiffs allege, the Montana Supreme Court decision is not "final," then there could not have been deprivation of plaintiffs' property without due process and, therefore, this 42 U.S.C. § 1983 claim is premature. This Court fails to see how judicial economy would be served by issuing a stay in the present proceedings.

It seems much more likely that such economy would better be served by proceeding to the merits of the claims of all parties.

Secondly, the Court, after reviewing briefs and hearing oral argument, has concern with regard to plaintiffs' likelihood of success on the merits. This, couple with the already protracted litigation in the state case, is a factor in the exercise of this Court's discretion.

Based on the foregoing,

IT IS ORDERED that plaintiffs' motion for a stay of proceedings is denied.

The Clerk of Court is directed to forthwith notify the parties of the making of this order.

DONE and DATED this 7th day of September, 1989.

s\ Jack D. Shanstrom
United States Magistrate

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 88-331

CONTINENTAL OIL COMPANY, a corporation, Petitioners,	)	FILED FEB 24, 1989
-v-	)	CAROL WADE
ELKS NATIONAL FOUNDATION, a legal entity; et al.,	)	CLERK OF COURT
Respondents.	)	ORDER

Plaintiffs and Respondents have petitioned for rehearing in this matter pursuant to Rule 34, Montana Rules of Civil Procedure. We have considered the petition and the objections filed by the petitioner, Continental Oil Company.

IT IS ORDERED:

1. Respondent's petition for rehearing is denied.

2. The clerk shall mail a copy of this order to counsel for the respective parties.

DATED this 22nd day of February, 1989.

J.A. Turnage /s/
Chief Justice

John Conway Harrison /s/

Fred J. Weber /s/

William E. Hunt, Sr./s/

R. C. McDonough /s/
Justices

RECORDED February 24, 1989

BOOK (6) Order

PAGE 420

INDEXED n

COMPARED n/w

Leonard H. Langen /s/
Judge Leonard Langen
sitting for Justice
L.C. Gulbrandson

Frank I. Haswell /s/
Retired Chief Justice
Frank I. Haswell
sitting for Justice
John C. Sheehy.

FILED '89 FEB 22 PM 2 42,
ED SMITH,CLERK, MT SUPREME COURT

No. 85-321

IN THE SUPREME COURT OF THE STATE OF MONTANA

1986

FRANK A. GUNNIP, Receiver of McDonald & Eide, Inc., a corp., GENE HUNTLEY and ROBERT P. SCHWINN,

Plaintiffs and Appellants,

-vs-

CONTINENTAL OIL COMPANY, a corp., and SHELL OIL COMPANY, a corp.,

Defendants and Respondents.

APPEAL FROM: District Court of the Sixteenth Judicial District, In and for the County of Fallon, The Honorable Nat Allen, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Huntley & Eakin; Gene Huntley argued, Baker, Montana

For Respondent:

Moulton, Bellingham, Longo & Mather; William Bellingham,

Billings, Montana (Shell Oil) Ms. E.V. Gross argued for Shell Oil, Houston, Texas, Crowley Law Firm; Carolyn Ostby argued for Continental Oil, Billings, Montana

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Submitted: May 13, 1986

Decided: September 9, 1986

Filed: SEP 9 - 1986

Ethel M. Harrison/s/
Clerk

Mr. Justice Frank B. Morrison, Jr. delivered the Opinion of the Court.

Plaintiffs appeal the April 25, 1985, order of the Sixteenth Judicial District Court granting summary judgment in favor of defendants. We reverse and remand.

This action was brought by plaintiffs to secure an additional 1/8 of the proceeds from a producing oil well in

Fallon County, Montana. The lease (Lease) in dispute covers the NW¼ of Section 8, Township 7 North, Range 60 East, and has been the subject of litigation twice previously. A brief history of the chain of title is in order.

Prior to July 1955, McDonald & Eide, Incorporated (M & E) owned the entire working interest in the Lease. At all times, the Lease has been subject to a 12.5% landowner royalty and a 3% overriding royalty; these royalty interests are not in dispute. On July 12, 1955, M & E assigned 100 percent of its interest in the S½ of the NW¼ and 50 percent of its interest in the N½ of the NW¼ to H. W. McDonald. McDonald did not record this assignment until May 15, 1963.

On January 22, 1958, M & E's corporate charter was repealed for failure to

pay taxes. Under Delaware law, the corporation had three years to wind up its business. On June 1, 1961, corporate officers of M & E purported to assign M & E's total working interest in the Lease to Vernon Eide and Jacob Von DeLinde. This assignment conflicted with the one previously made to McDonald.

Shortly thereafter, Continental Oil Company (Continental) began negotiations with Eide & Von DeLinde to purchase the Lease. Recognizing that McDonald had filed a quiet title action against Eide and Von DeLinde concerning the Lease, Continental sought McDonald's participation in the deal. On May 22, 1962, Eide & Von DeLinde assigned an undivided ½ interest in the Lease to Continental. On May 24, 1962, McDonald signed an agreement ratifying the assignment from Eide &

Von DeLinde to Continental of an undivided ½ interest in the Lease. The ratification agreement provided in part,

> . . . the undersigned, H. W. McDonald, does hereby ratify, adopt and confirm said assignment, in all things with the same force and effect as if the undersigned had been named the assignor therein and had duly executed and delivered said assignment to Continental Oil Company.
>
> For the same consideration, the undersigned does hereby transfer, assign, set over and convey unto Continental Oil Company an undivided one-half (½) interest in the oil and gas lease above described . . .

On March 20, 1964, while McDonald's

quiet title action was still pending, McDonald made the following assignments: to Gene Huntley 50 percent of his interest in the S½ of the NW¼ and an undivided 50 percent interest in the N½ of the NW¼; to Donald Iverson 25 percent of his interest in the S½ of the NW¼ and an undivided 25 percent interest in the N½ of the NW¼; to Alvin Larson 25 percent of his interest in the S½ of the NW¼ and an undivided 25 percent interest in the N½ of the NW¼. Each of these assignments included a provision that the intent of the assignment was to convey to the assignee the respective share of moneys "held in suspense by Continental Oil Company."

On June 16, 1964, final judgment no. 3679 was entered in McDonald's quiet title action against M & E, Eide, Von

DeLinde and Continental. The judgment quieted title in the Lease in McDonald to the extent of 50% of the N½ of the NW¼ and all of the S½ of the NW¼, yet held McDonald's interest subject to the ratification agreement with Continental. The interests of Huntley, Iverson, and Larson were not addressed by the judgment.

On May 28, 1965, the stockholders of M & E appointed Frank Gunnip as receiver for M & E. On February 23, 1967, Gunnip sued M & E and its corporate officers to recover the Lease and other property. Findings of fact and conclusions of law were entered by the trial judge on December 21, 1970, ruling that the conveyance in 1961 of the Lease from M & E to Eide and Von DeLinde was voided in its entirety. Final judgment was delayed for several years due to interim proceedings

providing for payment to parties who had developed the Lease. On January 7, 1976, final judgment no. 4062 was entered, providing that Gunnip was owner of a one-half interest in the N½ of the NW¼; defendants Eide, Von DeLinde and Continental were held to have no interest in the Lease.

Shell Oil Company, responsible for disbursing the proceeds from the Lease, continued to pay Continental ½ of the proceeds based upon Continental's assertions that it was entitled to that fraction. Continental continued to claim a 50 percent interest under the ratification agreement with McDonald. Although judgment no. 4062 held that Gunnip was owner of a 50 percent interest in the N½ of the NW¼, Shell was paying him an amount equal to a 25 percent interest.

On October 6, 1981, Gunnip assigned a 3.75 percent interest in the N½ of the NW¼ to Huntley, and a 2.5 percent interest in the N½ of the NW¼ to Robert Schwinn.

Huntley became aware that Gunnip was not receiving his full share, and following demands for payment, Gunnip, Huntley and Schwinn filed suit requesting an additional 1/8 of the proceeds from the Lease. Following summary judgment motions from both parties, summary judgment was granted in favor of Continental by order dated April 25, 1985.

The sole issue an appeal is whether the District Court erred in granting Continental's motion for summary judgment.

Rule 56(c), M.R.Civ.P. provides that summary judgment shall be granted when

the record discloses no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. A review of the record before the District Court in this case reveals fact issues which must be resolved.

Continental asserts it is entitled to a 50% interest in the N½ of the NW¼ of the Lease under the ratification agreement with Mc Donald. However, Continental admits in its brief that it did not adopt this position at the time the ratification agreement was executed in 1964; prior to the time judgment no. 4062 was entered, Continental derived a 25% interest in the N½ of the NW¼ from the Eide and Von DeLinde conveyance and a 25% interest under the ratification agreement. Judgment no. 4062 voided the conveyance from M & E to Eide and Von DeLi-

nde in its entirety, thereby eliminating the 25% interest Continental claimed under assignment from Eide and Von DeLinde. Following judgment no. 4062, Continental continued to assert a 50% interest under the ratification agreement with McDonald.

There remain unresolved issues of material fact regarding the interest of Continental. Although McDonald conveyed an "undivided one-half interest" in the Lease under the ratification agreement, Continental admits in its brief that it did not treat its 50% interest in the N½ of the NW¼ as being derived solely from McDonald until judgment no. 4062 was entered. In 1964 McDonald assigned undivided interests to Huntley, Iverson, and Larson. Huntley, Iverson and Larson have claimed under this assignment adverse to

the interest Continental now claims under the ratification agreement. A trial must be held to assess Continental's interest considering potential application of adverse possession, waiver and estoppel.

The court cannot decide Continental's interest under McDonald's ratification agreement without McDonald's assignees before the court. They must be joined on remand.

Continental's asserted 50% interest in the N½ of the Lease must be tested against the interest of McDonald's assignees and their successors in interest. The order of the District Court awarding summary judgment to Continental is reversed. The matter is remanded for further proceedings in accordance with this opinion.

Frank B. Morrison, Jr./s/

We Concur:

J.A. Turnage /s/

Daniel J. Weber

William E. Hunt, Sr.

Justices

Frank I. Haswell

Honorable Frank I. Haswell,
Retired Chief Justice,
sitting in place of Mr.
Justice, L.C. Gulbrandson

Justice John C. Sheehy, dissenting:

I dissent.

The bone of contention in this law suit is Continental's argument that it now owns all of McDonald's undivided one half interest in the leasehold as it pertains to the N½ of the NW¼ of Section 8, Twn 7 N, R 60 E, in Fallon County,

Montana.

I agree that the District Court should be reversed, but it is my view that we should order a summary judgment in this case in favor of Gunnip and has assigns to the effect that Gunnip and his assigns are entitled to 25% of the working interest in the NW¼ Section 8, Twn 7 N, R 60 E.

We should further order a summary judgment to the effect that Continental Oil Company is entitled to 37.5% of the working interest in the said NW¼ of Section 8.

We should further order a summary judgment that the remaining 37.5% of the working interest in the said NW¼ is owned by McDonald and his assigns.

The working interest is 84.5% of 100% of production.

General Observations

None of the parties that are involved in this action owns a fee simple title either to the land or minerals. The quarrel in this lawsuit is about the division of the leasehold interest. The res of the lawsuit is the original lease, which had to be kept in force by the lessees, either by development of an oil and gas well or by the payment of delay rentals. We do not have the terms of the original lease before us. We only know from reference in the instruments that an oil and gas lease to the whole of the N½ of Section 8 (including the NW¼ and the NE¼) was given by William P. Knox, a single man, and Mrs. Marsha Know Orrock and her husband, Robert Orrock, to a Frank H. Becker. Becker apparently assigned the full leasehold interest, sub-

ject to the landowners royalty and a 3% overriding royalty to McDonald and Eide, Inc., a corporation, before the commencement of the matters involved this lawsuit.

After Continental drilled, and oil and gas was produced in commercial quantity on the leasehold the Montana Oil and Gas Commission adopted 160-acre spacing rules for the area. This means that the NW¼ of the section is treated as one spacing unit, and the NE¼ of the section is treated as a separate spacing unit, even though both of these quarter sections were included in the leasehold interest owned by McDonald and Eide, Inc. For the purposes of this lawsuit, we are interested only in the leasehold interests in the NW¼.

Since the spacing unit is 160 acres,

a person owning either land or a lease-hold interest under the area of the NW¼ is entitled to share in the proceeds from any oil or gas produced in the NW¼ in the proportion that either his landowner's royalty ownership, overriding royalty ownership, or lease ownership bears to 160 surface acres. The denominator is always 160 surface acres.

Facts

The facts in this case must be stated more clearly.

On June 1, 1961, McDonald and Eide, Inc., then the record owner of the lease-hold interest, but subject to the landowners royalty and a 3% overriding royalty, ostensibly assigned all of its interest in the oil and gas lease to Vernon M. Eide and Jay Von DeLinde (hereafter Eide and Von DeLinde) in the N½ of Section 8,

Twn 7 N, R 60 E. This assignment was recorded and as far as the record title is concerned, indicated that Eide and Von DeLinde were the successors in interest to all of the interests of McDonald and Eide, Inc., in the oil and gas lease. Thus, Eide and Von DeLinde were the ostensible owners of all of the working interest; in other words after deducting royalty interests, Eide and Von DeLinde were the owners of 84.5% of 100% of the oil and gas rights of the land involved.

However, on July 12, 1955, prior to the ostensible assignment to Eide and Von DeLinde, the corporation McDonald and Eide, Inc., had assigned to H.W. McDonald, a portion of the leasehold interest in the following language:

> . . . all of its right, title and interest of the original lessee and

present owner in and to said lease and rights thereunder, insofar as it covers the south half of the north west quarter (S½ and NW¼) of Section 8, Twn 7 N, R 60 E, and 50% of its interest undivided in the north half of the north west quarter (N½ of the NW¼) of Section 8, Twn 7 N, R 60 E, subject also to the 3% overriding royalty reserved . . .

Note that the description in the assignment from the corporation to McDonald related only to the leasehold interest in the NW¼ of the section, and that it was an assignment of an interest in the lease. Under the rules relating to 160-acre spacing units, McDonald thereby became the owner of 120/160, or 75% of the working interest in the whole of the NW¼.

Since McDonald became entitled to 75% of the working interest under the NW¼ of the leasehold, it follows that the assignor, McDonald and Eide, Inc., still held the remaining 25% of the working interest in that quarter section.

H. W. McDonald did not immediately file for record in Fallon County the assignment from McDonald and Eide, Inc., to him of a portion of the leasehold interest.

Enter Continental Oil Company in 1962. On February 27, 1962, it entered into a farmout agreement with Eide and Von DeLinde, (as record owners of the whole of the leasehold interest) covering the N½ of Section 8, Twn 7 N, R 60 E, subject to the overriding royalty.

A farmout in the oil business occurs when the holders of the leasehold inter-

drill a well. The consideration in this case was 50% of the working interest in the lease.

Under the terms of the farmout agreement with Continental, Eide and Von DeLinde agreed to assign to Continental and "undivided one-half interest in and to the said lease insofar as it covers said lands."

In accordance with the farmout agreement, Eide and Von DeLinde did, on May 22, 1962, make an assignment to Continental Oil Company of "an undivided one-half of that certain oil and gas lease" covering the N½ of the said Section 8. Eide and McDonald further provided:

> Assignee [Continental] agrees to bear and pay an undivided one-half (1½) of the land owner's royalty and

of the overriding royalty not in excess of three percent (3%) burdening the above described lease.

Somehow the record before us does not show how Continental Oil learned that H. W. McDonald had an interest in the leasehold. The interest of H. W. McDonald, of course, arose from the aforementioned assignment of July 12, 1955, wherein McDonald and Eide, Inc., had assigned to H. W. McDonald 100% of its leasehold interest in the S½ of the NW¼ of Section 8, and an undivided ½ interest of its leasehold interest in the N½ of the NW¼ of Section 8. Although this assignment was made in 1955, McDonald had not recorded the instrument and did not record it until the 1960's. Thus when Continental did its title work on the farmout from Eide and Von DeLinde, the courthouse

records did not indicate the McDonald interest in the leasehold.

On learning of the possible McDonald claim to a portion of leasehold interest, Continental obtained from H. W. McDonald a "Ratification and Adoption of Assignment" in accordance with the assignment that it had already obtained from Eide and Von DeLinde. Such a written instrument was executed by McDonald on May 24, 1962, and by it McDonald ratified and confirmed the Eide and Von DeLinde assignment, and went on to say:

> For the same consideration, the undersigned does hereby transfer, assign, set over and convey onto Continental Oil Company an undivided one-half interest in the oil and gas lease above described and in the leasehold estate created thereby on

the same terms and conditions as are set forth in the assignment attached hereto and marked exhibit "A."

(Underlines ours.)

Thus, in May of 1962, Continental thought it had covered all the bases. It had a farmout agreement and assignment from Eide and Von DeLinde for a 50% interest in the leasehold for all of the N½ of Section 8, and at the same time it had a ratification and adoption of assignment from McDonald for the same acreage in case it developed that McDonald did in fact own an interest in the leasehold by virtue of an unrecorded instrument. Continental could relax and go ahead with its drilling program, which it did, and after a well was successfully developed, it felt safe enough to enter into an operator's agreement with Eide and Von

DeLinde.

The operating agreement was made after the successful well was drilled and was dated September 25, 1962. The parties are Continental Oil Company and Eide and Von DeLinde. The instrument describes that Continental has a 50% interest in the leasehold, and contains the following provision in case of failure of title:

> 20. Failure of title. In the event of the failure or partial failure of title to any interest subject hereto, the loss of any such title or titles shall be borne proportionately in accordance with the respective undivided interests of the parties in the lease title to which fails (sic) and no party shall be liable to any other for the loss

of any such title.

The roof fell in for Continental Oil Company, as far as Eide and Von ~~DeLi~~nde are concerned, when the District Court in Fallon County determined on December 18, 1970, that the purported assignment to Eide and Von DeLinde from McDonald and Eide, Inc. (the assignment of June 1, 1961,) was void for several reasons. By virtue of that judgment any claim of Continental to a portion of the working interest through Eide and Von DeLinde failed. The interest in the leasehold that was purportedly held by Eide and Von DeLinde was vested by the District Court judgment in Frank Gunnip, as receiver for the corporation, McDonald and Eide, Inc. Continental holds no lease or instrument of any kind signed by Gunnip, his predecessors, or successors that would now

serve to limit Gunnip's interest. The judgment means that Gunnip and his assigns are the sole owners of the working interest in the NE¼ of Section 8. It further means that Gunnip and his assigns are the sole owners of an undivided one-half of the working interest in the N½ of the NW¼ of Section 8. Since Gunnip and his assigns own an undivided one-half of the working interest in the N½ of the NW¼ of the leasehold, his leasehold interest in that tract is 40 surface acres of working interest. The proportion of 40 over 160 equals 25%. Gunnip and his assigns are entitled to that amount of working interest irrespective of any other result in this lawsuit.

The remaining interest in the NW¼ is owned by H. W. McDonald and his assigns, but subject to the terms of the ratifica-

tion and adoption of assignment that McDonald had signed for Continental on May 24,1962.

After the 1955 assignment from McDonald and Eide, Inc., H.W. McDonald owned all of the working interest in the S½ of the NW¼ of Section 8, and an undivided one-half of the working interest in the N½ of the NW¼ of said section. Continental claims that under the ratification agreement signed with McDonald, it is entitled to 50% of the working interest under the S½, and all of McDonald's working interest in the undivided one-half of the N½ of the quarter section. Because McDonald's interest in the N½ is only an undivided one-half, Continental claims that under its ratification and adoption of assignment agreement with McDonald, it became the owner of 100% of

McDonald's interest in the N½ of the quarter section.

The fallacy of Continental's position can be shown in two ways: One, the ratification and assignment signed by McDonald (and by Eide and Von DeLinde) did not constitute nor was it intended to constitute a transfer of the surface acres underlying the lease. Rather it was a transfer of a percentage interest in a leasehold, the lease which is res of this lawsuit, an interest which may be calculated by reference to the surface acres. Two, if Eide and Von DeLinde had in fact a valid ownership of an undivided one-half interest in the N½ of the quarter section, and H. W. McDonald owned the other undivided one-half interest, under Continental's position, Continental would have earned from the two sources 100% of

the working interest in the N½ of the quarter section by virtue of its farmout agreement and the assignments. This is absurd.

Giving effect to the intention of the parties, Continental, through the farmout and assignments, could only have earned 50% of the leasehold interest validly held by the parties with whom it contracted. The result is that with respect to the NW¼, Continental owns 50% of the working interest underlying the S½ of the NW¼, and 25% of the underlying leasehold in the N½ of the said quarter section.

Reduced to acreages and percentages, of the 80 surface acres underlying the S½ of the quarter section, Continental owns 40 acres of working interest. Of the 40 surface acres representing an undivided

one-half interest in the N½ of the quarter section, Continental owns 20 acres of working interest. It therefore owns a total of 60/160 surface acres in the NW¼ or 37.5% of the working interest.

The interest of H.W. McDonald in the NW¼ is subject to subsequent assignments. Those assignments are of record, and there is no contest before us as to the propriety of those assignments. A further lawsuit is not necessary in order to determine those interests and the remand by this Court to determine those interests is quite unnecessary.

There is no need for further extended litigation in this case. There should be no quarrel about the interests of the assigns under Gunnip, nor of the assigns under McDonald's 37.5% interest. All that should be left for the District

Court to do, in my view, would be to require an accounting and make appropriate division of the monies held back and to be earned. I would so order.

John C. Sheehy /s/
Justice

Mr. Justice John C. Harrison:

I join in the dissent of Mr. Justice Sheehy.

John Conway Harrison /s/
Justice

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FILED
MAY 5, 1988
JEAN CAMERON
CLERK OF COURT

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, FALLON COUNTY

ELKS NATIONAL FOUNDATION, a legal entity; et al., Plaintiffs, -VS- CONTINENTAL OIL COMPANY, et al., Defendants.	No. 5003 ORDER

The figures .875 appearing at three places on page 16 of the "Partial Summary Judgment" entered by the court May 2, 1988 and dated April 29, 1988 are changed from .875 to .845 and the clerk is or-

dered to make the amendments to the judgment by interlineation.

Dated May 4, 1988.

s\ Nat Allen
Nat Allen, District Judge,
Presiding

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MONTANA SIXTEENTH JUDICIAL DISTRICT
COURT, FALLON COUNTY

ELKS NATIONAL FOUNDATION, a legal entity; et al., Plaintiffs, -VS- CONTINENTAL OIL COMPANY, a corporation, et al., Defendants.	No. 5003

PARTIAL SUMMARY JUDGMENT

All of the parties in this matter have moved for summary judgment except defaulted party Jef T. Stites.

Pursuant to said motions the court makes the following as its

FINDINGS OF FACT

(1)

This matter concerns an oil and gas lease on the NW¼ of Section 8, Township 7N, Range 60E, M.P.M. in Fallon County, Montana. The lease in question is part of an oil and gas lease (Ex. W) dated June 8, 1953 from William P. Knox and others, recorded at page 224 in Book 31 of Miscellaneous of the Fallon County records. There is no dispute about the landowners royalty of 12½% or overriding royalty of 3%. The dispute in this case is concerned solely with the 84½% working interest. At the present time the lease is being produced for oil and gas purposes by defendant Shell Oil Company as part of the Pennel unit. It has been identified by Shell Oil Company as tract 86 of the Pennel unit.

(2)

Plaintiffs are Gene Huntley, as assignee of Frank Gunnip, receiver of McDonald & Eide, Incorporated, and the assignees of H.W. McDonald, that is, Elks National Foundation, a legal entity; Floyd R. Young; Chad Randall Young by his guardian Sherry L. Young; Joshua Lee Young, by his guardian Sherry L. Young; Michael Edwin Maxwell by his guardian Shirley G. Johnson; Corinna Nell Maxwell, by her guardian Shirley G. Johnson; Lois E. LaRue Riggins; Sherry L. Young; James Byrd; Joseph Edwin Maxwell, Jr.; Betty Wilson; Mary Jo Byrd; Thomas A. Larson and Gene Huntley.

(3)

Plaintiffs claim that Frank Gunnip and his assigns, Gene Huntley and Robert Schwinn, own an undivided 1/2 interest in the N½NW¼ (a 1/4 interest in the entire

NW¼ of said lease). They also claim that the McDonald assignees own a 1/2 interest in the S½NW¼ and a 1/4 interest in the N½NW¼ (or a 3/8ths interest in the entire NW¼). Plaintiffs claim damages from defendants Shell Oil Company and Continental Oil Company for not paying over to them their proper share of the lease proceeds, punitive damages for bad faith and breach of fiduciary relationship and for cancellation of the assignment from H. W. McDonald to defendant Continental Oil Company under which defendant Continental Oil Company claims an interest in the lease. They have moved for partial summary judgment with respect to lease ownership leaving all other issues for later disposition by the court. Plaintiffs are represented in these proceedings by Gene Huntley of Baker, Montana.

(4)

Defendants Frank Gunnip and Robert Schwinn claim that Frank Gunnip and his assignees Gene Huntley and Robert Schwinn own an undivided 1/2 interest in the N½NW¼ of said lease, (a 1/4 interest in the entire NW¼ of said lease). Their cIaim with respect to the ownership by Gunnip and his assigns is identical to the claim made bv plaintiffs. They have made a motion for summary judgment with respect to the claims of Gunnip and his assignees, Huntley and Schwinn. They are represented in these proceedings by James Sandall of Billings, Montana.

(5)

Defendant Jef T. Stites is an assignee of H.W. McDonald. For the purpose of this litigation his legal position is the same as the other McDonald assignees.

Mr. Stites has not appeared in these proceedings either personally or by attorney. He has been served with process and his default has been regularly entered.

(6)

Defendant Shell Oil Company is the unit operator of the Pennel unit in which the oil and gas lease in question is situate. Defendant Shell Oil Company does not claim to own any part of the lease in question and takes no position with respect to its ownership. It has filed a motion for summary judgment in these proceedings relating to the matter of its liability to the lease owners. Shell Oil Company is represented in these proceedings by William Bellingham of the firm Moulton, Bellingham, Longo & Mather of Billings, Montana.

(7)

Defendant Continental Oil Company claims in these proceedings to be the owner of 1/2 of the working interest of the oil and gas lease in question. It resists the motion of plaintiffs and defendants Gunnip and Schwinn for summary judgment. It is represented in these proceedings by Carolyn Ostby and Chris Mangen of the firm Crowley, Haughey, Hanson, Toole & Dietrich of Billings, Montana.

(8)

The oil and gas lease in question was owned, in the year 1955, by McDonald & Eide, Inc. a Delaware corporation. On July 12, 1955 it conveyed the S½NW¼ and an undivided 1/2 interest in the N½NW¼ to H. W. McDonald, reserving to itself, thereby, an undivided 1/2 interest in the

N½NW¼ or a 1/4 interest in the entire NW¼. The conveyance to H. W. McDonald is recorded at page 32, Book 55 of Miscellaneous of the Fallon County records. (Ex. H)

(9)

On June 1, 1961 McDonald and Eide, Inc. conveyed all of the lease, including the portion previously deeded to H. W. McDonald to Vernon M. Eide and J. Von DeLinde. This conveyance is of record at page 519 of Book 48 of the Miscellaneous of the Fallon County records. (Ex. X).

(10)

H. W. McDonald filed suit in the district court of Fallon County, Montana versus McDonald & Eide, Inc., and Vernon M. Eide, Von DeLinde, and others to clear his title to the lease. This suit, Fallon County Civil No. 3679 was eventually

successful and McDonald received a judgment in his favor clearing his title on June 16, 1964. (Ex. Y and see Fallon Co. #3679).

(11)

On February 27, 1962, Jacob Von DeLinde and Vernon Eide, before the conclusion of H. W. McDonald's suit, entered into a "farmout" agreement with defendant Continental Oil company which contemplated Continental developing the premises and receiving, therefore, a 50% interest in the lease. (Ex. P). Pursuant to that agreement an assignment or deed conveying a 50% interest in the lease was given by Eide and Von DeLinde to Continental on May 22, 1962. This conveyance was recorded at page 184 of Book 53 of Miscellaneous in the Fallon County records. (Ex. I).

Because H. W. McDonald's suit against the McDonald & Eide, Inc. to clear his title to his assigned interest in the lease was pending when the assignment or deed from Vernon Eide and Jacob Von DeLinde was given to Continental, defendant Continental asked H. W. McDonald to ratify the agreement it had with Vernon L. Eide and Jacob Von DeLinde. This ratification was dated May 24, 1962 recorded at page 187 of Book 53 of Miscellaneous in the Fallon County records. (Ex. Z) It is the principal source of dispute in these proceedings. The purpose of Continental in seeking the ratification was so that it would be protected in the event McDonald won his case against the McDonald & Eide, Inc. It was the intent and understanding of both

parties, McDonald and Continental, that by the ratification McDonald was conveying 1/2 of whatever he owned in the lease in question as determined by his pending lawsuit, Civil No. 3679, aforesaid, so that at its conclusion Continental would own a 1/2 interest in the lease and McDonald on one hand and Eide and Von DeLinde on the other hand would have deeded 1/2 of what they owned to Continental.

(13)

After the conclusion of H. W. McDonald's litigation against the McDonald & Eide, Inc. and on July 16, 1984 Continental wrote to H. W. McDonald's assignees and agreed with them precisely as to what had been conveyed by H. W. McDonald in the assignment in question. In this agreement Continental agreed that H. W. McDonald had conveyed 1/2 of what he

owned in the NW¼, (1/2 of the S½NW¼ and 1/4 of the 1/2 interest in the N½NW¼ or a 3/8ths interest in the entire NW¼). (Ex. AA) Following this agreement and on July 29, 1964 Continental prepared and forwarded oil division orders to the McDonald assignees which reflected that they were the owners of a 3/8ths interest in the property in dispute (the NW¼ of Sec. 8, Twnshp 7N, Rge. 60E). (Ex. BB) Payments were made to them on that basis.

(14)

On February 23, 1967, Frank Gunnip as receiver of McDonald & Eide, Inc., sued Vernon L. Eide, Jacob Von DeLinde and defendant Continental Oil Company, among others, to recover the oil and gas lease which had been conveyed by the corporation to Vernon Eide and Jacob Von DeLinde (see paragraph 9 (supra) (Ex.

A)). Gunnip was successful in his case, Fallon County Civil No. 4062, and obtained judgments against Eide, Von DeLinde and Continental which cleared his title to the 1/2 interest in the N½NW¼, the interest which has been reserved to the corporation McDonald & Eide, in the conveyance to H. W. McDonald. (Exs. B, E & F, Fallon Co. Civil #4062 paragraph 8 (supra))

(15)

During the pendency of Gunnip's litigation with Eide, Von DeLinde and Continental he was not paid any of the lease income attributable to the interest he was claiming. Because the improvements on the lease had to be paid for from production and because of other litigation involving the receiver, Frank Gunnip, in the State of Delaware the

lease proceeds were not paid over to Gunnip until December of 1980. The amount paid over to Frank Gunnip, as receiver, in 1980 was supposed to be a 1/4 interest in the income from the property from the time Gunnip's suit was commenced, as aforesaid, in 1967, until payment was made in December, 1980. No accounting was furnished to Gunnip by unit operator, Shell Oil Company as to how the payout to him, as receiver, was calculated until June 28, 1982. (Ex. K) When this accounting was furnished and it was apparent that Gunnip had been paid 1/8th rather than 1/4th of the lease proceeds demand was made on December 16, 1982 (Ex. L) that the mistake be rectified. When the mistake was not rectified Gunnip and his partial assignees, Gene Huntley and Robert Schwinn, filed the

within litigation against Continental Oil Company and Shell Oil company, the unit operator.

(16)

After the commencement of the within litigation, as aforesaid, (paragraph 15) defendant Shell Oil Company at the instance of defendant Continental Oil company commenced withholding 1/8th of the lease proceeds payable to the McDonald assignees. This withholding commenced December 18, 1985. (Ex. K to 3rd Amended Complaint) At that time defendant oil companies had been paying lease proceeds to the McDonald assignees periodically, generally monthly, for a period of over twenty years on the basis they were the owners of a 3/8ths interest in the lease as shown by the assignment of McDonald of May 24, 1962 and the agreements constru-

ing it of July, 1964 (paragraphs 12-14 supra).

(17)

In 1985 Gunnip and his assigns and Continental moved for summary judgment. Summary judgment was granted to Continental April 25, 1985. This judgment was appealed and on appeal the judgment was reversed the supreme court saying in pertinent part:

> "There remain unresolved issues of material fact regarding the interest of Continental. Although McDonald conveyed an "undivided one-half interest" in the Lease under the ratification agreement, Continental admits in its brief that it did not treat its 50% interest in the N½ of the NW¼ as being derived solely from McDonald until judgment

no. 4062 was entered. In 1964 McDonald assigned undivided interests to Huntley, Iverson, and Larson. Huntley, Iverson and Larson have claimed under this assignment adverse to the interest Continental now claims under the ratification agreement. A trial must be held to assess Continental's interest considering potential application of adverse possession, waiver and estoppel."

Following the ruling of the supreme court and pursuant to it the McDonald assignees were joined as parties, the parties were aligned according to their interest and amended pleadings were filed and responded to. There are no factual issues for resolution before the court on the question of the contested ownership

and the matter of title is ready for resolution by summary judgment.

(18)

With respect to the claim of 1/4 interest being advanced by Gunnip and his assignees Huntley and Schwinn, they are the successors in interest to the corporation McDonald & Eide, Inc. which, all agree, had good title to the entire lease. The only conveyance made by their predecessor, McDonald & Eide, Inc. was to H. W. McDonald (see paragraph 8 supra) in which there was reserved the 1/4 interest which they claim. They have good title to the 1/4 interest. The principal claims of Continental that it has rights to a 1/2 interest in the lease because of the conveyance to it by H. W. McDonald (paragraph 12 supra), even if true, could not affect the title of Gunnip and his

assignees. McDonald is the grantee of Gunnip's predecessor. His activities could not and did not affect the reserved title of gunnip and his assignees. Also as between Continental and Gunnip there are judgments (Ex. B, E & F) in Fallon County Civil 4062 which determine that Gunnip has a 1/4 interest in the property in question. There are no facts before the court to base a finding that Continental has a right to claim title as against Gunnip and his assignees on the basis of estoppel, waiver, adverse possession, statute of limitations or any other defense Continental has pled to the title claim of Gunnip and his assignees, Huntley and Schwinn.

(19)

With respect to the title claim of the McDonald assignees versus Continental

the court finds that it was the intent of McDonald at the time he executed the assignment under which Continental claims (paragraph 12, supra), as shown by that document, the assignment to which it refers (Ex. I, paragraph 11 supra) and the "farmout" agreement which it ratifies, (Ex. P) to convey to Continental a 1/2 interest in what he owned that is 1/4 interest in the N½NW¼ rather than all of his 1/2 interest therein. This intent, shown by the aforesaid exhibits, is also shown by the agreements entered into between Continental and the McDonald assignees in 1964, after the conclusion of the McDonald litigation, in which Continental and the McDonald assignees agreed that the affect of the McDonald assignment in question was to convey to Continental a 1/4 interest in the N½NW¼

or a 3/8ths interest in the entire NW¼. (paragraph 13, supra)

There is no basis for the court to find that Continental has any claim to the agreed title of its grantor's successors, the McDonald assignees, by reason of adverse possession, estoppel, waiver, or any other defense which Continental has pled to their claim.

The court does find that the agreement by Continental and the McDonald assignees as shown by the letter of July 16, 1984 (Ex. AA) and the oil division order which Continental drew on July 29, 1964, (Ex. BB) together with the payment to the McDonald assignees from 1964 to 1985 on the basis that they owned a 3/8ths interest in the lease in question creates an estoppel of Continental from claiming that McDonald reserved less than a 3/8ths interest in the NW¼ in his conveyance to it in 1962, Exhibit Z, paragraph 12 (supra).

Wherefore by reason of the findings aforesaid and of the law, the court makes the following at its

CONCLUSIONS OF LAW.

1. This case concerns the 84.5%

working interest in the oil and gas lease described above.

2. Frank Gunnip and his assignees, Gene Huntley and Robert Schwinn are the owners of an undivided 1/2 interest in the N½NW¼ of said lease (a 1/4 interest in the entire NW¼ of said lease).

3. The McDonald assignees own a 3/8ths interest in said lease, a 1/2 interest in the S½NW¼ and 1/4 interest in the N½NW¼.

4. Defendant Continental Oil Company owns a 3/8ths interest in said lease, the same as said McDonald assignees, a 1/2 interest in the S½NW¼ and 1/4 interest in the N½NW¼.

5. The conveyance in question under which Continental claims to be the owner of 1/2 rather than 3/8ths of the working interest in the lease, the con-

veyance to it by McDonald (Ex. Z) must be construed according to the parties' intention at the time of its execution and delivery. At the time of the execution and delivery of the document it was the parties' intention that Continental would have a 1/2 interest in the property by H. W. McDonald on one hand and Eide and Von DeLinde on the other hand each conveying 1/2 of what they owned to Continental. The parties did not intend at the time of the conveyance that McDonald convey more than 1/2 of what he owned. As the conveyance must be construed as of the time of its delivery the parties' intention at the time of delivery is critical and controlling. The court does not adopt Continental's argument that the conveyance in question could change as to quantity conveyed after its execution and

delivery because of the parties' mistake as to Eide and Von DeLinde's title, or otherwise.

6. Defendant Continental Oil Company is estopped to claim that the interest of the McDonald assignees is less than what they claim and what Continental agreed to was their interest in July, 1964.

7. No other parties before the court have any right to claim to the working interest in said lease except that Shell Oil Company has a right under its unit agreement with the owners to operate said lease as part of the Pennel unit.

8. The motion of plaintiffs for summary judgment should be granted. All plaintiffs should recover as they have moved. Granting of plaintiffs' motion

carries with it the motion for summary judgment made by parties Gunnip and Schwinn and also clears the title of defaulting defendant Jef T. Stites.

9. The motion for summary judgment made by defendant Shell Oil Company should be denied at this time. This judgement deals with title only. Shell makes no claim and takes no position with respect to title. Its motion for summary judgment will be more appropriately considered in evaluating the damage claims which have been made against it.

10. The claims of the McDonald assignees for cancellation of the McDonald to Continental document of May 24, 1962 (Ex. Z) under which Continental claims title, the claims of all the parties for damages, general and punitives, the motion of Gene Huntley for the ap-

pointment of a Montana receiver and the claim of lien of Gene Huntley for fees should be reserved from this decision for later disposition.

WHEREFORE by reason of the findings and conclusions aforesaid it is

ORDERED AND ADJUDGED

1. This judgment refers to the 84.5% working interest in the NW¼ of Section 8, Township 7N, Range 60E of that oil and gas lease dated June 8, 1953 given by William P. Knox and others recorded at page 224 of Book 31 of Miscellaneous of the Fallon County records.

2. Parties Frank Gunnip, as receiver, and Gene Huntley and Robert Schwinn are the owners of an undivided 1/2 interest in the N½NW¼, or a 1/4 interest in the entire NW¼. Their ownership in the NW¼, expressed as a decimal is

1/4 x ~~.875~~ (Changed to .845 by J.C. - Clerk of Court)----------.21125

The parties, Elks National Foundation, a legal entity; Floyd R. Young, Chad Randall Young by his guardian Sherry L. Young, Joshua Lee Young, by his guardian Sherry L. Young, Michael Edwin Maxwell by his guardian Shirley G. Johnson, Corinna Nell Maxwell by her guardian Shirley G. Johnson, Lois E. LaRue Riggins, Sherry L. Young, James Byrd, Joseph Edwin Maxwell, Jr., Betty Wilson, Mary Jo Byrd, Thomas A. Larson and Gene Huntley, the McDonald assignees and Jef T. Stites, are the owners of 1/2 of the S½NW¼ and an undivided 1/4 interest of the N½NW¼ or 3/8ths interest in the entire NW¼. Their interest in the NW¼ expressed as a decimal is as follows:

3/8ths x ~~.875~~ (Changed to .845 by J.C. -

Clerk of Court _____.316875

Defendant Continental Oil Company's interest in the lease is the same as the McDonald assignees, 1/2 of the S½NW¼ and 1/4 of the N½NW¼ or a 3/8ths interest in the NW¼. Defendant Continental Oil Company's interest expressed as a decimal is:

3/8ths x ~~.875~~ (Changed to .845 by J. C. - Clerk of Court)----------.316875

The total interest adjudicated is all the working interest in the aforesaid lease insofar as it applies to the NW¼ of Section 8, Township 7N, Range 60E-------.845.

No other parties before the court have an interest in the lease except that Shell Oil Company has a right under its unit agreement to operate the lease for the production of oil and gas.

3. This decision decides the ownership of the lease working interest. All other issues before the court are reserved for later ruling.

Dated 29 April, 1988.

s\ Nat Allen
Nat Allen, District Judge,
Presiding

(Court Seal)

RECORDED May 2, 1988
BOOK (9) Judgments
PAGE 42
INDEXED W
COMPARED W/C

May 2, 1988 - copies mailed to: J.C.

Honorable Nat Allen
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Roundup, Montana 59072

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No. 88-331

IN THE SUPREME COURT OF THE STATE OF MONTANA

1989

CONTINENTAL OIL COMPANY, a corporation,

Petitioner

-vs-

ELKS NATIONAL FOUNDATION, a legal entity; et al.

Respondents

ORIGINAL PROCEEDING:

COUNSEL OF RECORD:

For Petitioner:

Chris Magen, Jr. argued, Crowley, Haughey, Hanson, Toole & Dietrich; Billings, Montana

For Respondents:

Gene Huntley argued, Baker, Montana

James L. Sandall for Amicus Curiae Frank A. Gunnip and Robert P. Schwinn, Billings, Montana

Submitted: December 13, 1988
Decided: January 25, 1989

FILED
'89 JAN 25 AM 10 03
ED SMITH, CLERK
MONTANA SUPREME COURT

Filed:

Ed Smith /s/
Clerk

Mr. Justice Fred J. Weber delivered the Opinion of the Court.

This is an application for a writ of supervisory control under Rule 17, M.R. App.P. It follows a summary judgment by the District Court for the Sixteenth Judicial District, Fallon County, which adjudicated the ownership of the working interest in an oil and gas lease. We accept supervisory control and reverse the judgment of the District Court.

The issue is whether this Court should issue a writ of supervisory control to determine the extent of Continental Oil Company's ownership in the oil

and gas lease.

This case was before the Court previously as Gunnip v. Continental Oil Co. (Mont. 1986), 727 P.2d 1315, 43 St.Rep. 1605. That opinion sets forth the complicated history of the ownership of the working interest in the N½ of the NW¼ of Section 8, Township 7 North, Range 60 East. In all discussion in this opinion, we are referring to that working interest. In the Gunnip opinion, this Court indicated the ownership of the working interest, as established in previous judgments relating to the property, as follows: half of the N½NW¼ in H.W. McDonald, subject to a 1962 ratification agreement with Continental Oil Company (Continental), and the other half of the N½NW¼ in Frank Gunnip. Gunnip, 727 P.2d at 1316. The Court remanded the case to

District Court for joinder of essential parties and "to assess Continental's interest considering potential application of adverse possession, waiver and estoppel." Gunnip, 727 P.2d at 1317.

The plaintiffs in the present case trace their ownership in the N½NW¼ to conveyances from H.W. McDonald subsequent to the 1962 ratification agreement. The effect of the 1962 ratification agreement was argued on remand. The District Court ruled that the intent of the parties to the ratification was that Mr. McDonald conveyed to Continental one half of his interest in the N½NW¼. It ruled that the ownership of the N½NW¼ is as follows: one half in Frank Gunnip and his assigns, one fourth in plaintiffs, and one fourth in Continental. Continental filed a notice of appeal to which plaintiffs

objected because certification had not been obtained from the lower court as required by Rule 54(b), M.R.Civ.P. We allowed an opportunity for the lower court to certify its partial summary judgment, but the court declined to do so. Continental now asks this Court to exercise its power of supervisory control. At oral argument, counsel for plaintiffs joined in the request that this Court determine the interest of Continental in the N½NW¼.

Frank Gunnip and his assign Robert Schwinn, who were formerly plaintiffs, have obtained separate counsel and have been redesignated by the lower court as defendants. They have filed a third-party complaint below, asserting their right to one half of the working interest in the N½NW¼. In their brief to this

Court, they take no position on the application for supervisory control but ask that their one-half interest in the working interest in the N½NW¼ be acknowledged.

Should this Court issue a writ of supervisory control to determine the extent of Continental's ownership in the oil and gas lease?

Our case law has set forth the standard to be employed in determining whether supervisory control under Rule 17, M.R.App.P., is warranted. Supervisory control is proper to control the course of litigation when the lower court has made a mistake of law or willfully disregarded the law so that a gross injustice is done and there is no adequate remedy by appeal; also, to prevent extended and needless litigation. State Highway

Com'n. v. District Ct., Thirteenth J.D. (1972), 160 Mont. 35, 42-43, 499 P.2d 1228, 1232.

As the opinion in Gunnip stated, the 1962 ratification agreement signed by Mr. McDonald provided that:

> . . . the undersigned, H.W. McDonald, does hereby ratify, adopt and confirm said assignment, in all things with the same force and effect as if the undersigned had been named the assignor therein and had duly executed and delivered said assignment to Continental Oil Company.
>
> For the same consideration, the undersigned does hereby transfer, assign, set over and convey unto Continental Oil Company an undivided one-half (½) interest in the oil and

gas lease above described . . .

Gunnip, 727 P.2d at 1316. The plaintiffs argue here, as they did before the District Court, that the ratification is ambiguous so that a court must look beyond the four corners of the document to interpret it. The Court was not persuaded by that argument in Gunnip, nor is it now. We stated:

> There remain unresolved issues of material fact regarding the interest of Continental. Although McDonald conveyed an "undivided one-half interest" in the Lease under the ratification agreement, Continental admits in its brief that it did not treat its 50% interest in the N½ of the NW¼ as being derived solely from McDonald until judgment no. 4062 was entered. In 1964 Mc-

> Donald assigned undivided interests to Huntley, Iverson, and Larson. Huntley, Iverson and Larson have claimed under this assignment adverse to the interest Continental now claims under the ratification agreement. A trial must be held to assess Continental's interest considering potential application of adverse possession, waiver and estoppel.

Gunnip, 727 P.2d at 1317.

In the above quotation, this Court recognized that the ratification conveyed an "undivided one-half interest" in the lease. Then, as now, we found no ambiguity in the ratification agreement. We remanded so that adverse possession, waiver, and estoppel could be considered as theories under which Continental might

have subsequently lost or forfeited any portion of its one half interest. The District Court ignored this Court's opinion and reconsidered the effect of the ratification agreement. We therefore grant supervisory control.

We have considered all materials and evidence submitted by plaintiffs, including copies of certain oil division orders and correspondence between Continental and plaintiffs' attorney. We have considered whether those might support a theory of adverse possession, waiver, or estoppel against Continental. However, we find nothing to indicate that Continental has relinquished its claim to any portion of one half of the working interest in the N½NW¼. The documents reflect Continental's mistaken reliance, at that time, on the validity of interests

claimed by Vernon Eide and J. Von DeLinde. This ended after the 1970 judgment voiding the conveyance to Mr. Eide and Mr. Von DeLinde and vesting ownership in Gunnip. See Gunnip, 727 P.2d at 1316. Plaintiffs contend that the documents demonstrate that Continental relied upon a conveyance to it from Mr. Eide and Mr. Von DeLinde. We do not accept that contention. The mere statement in the letters and division order of a supposed interest held by Eide and Von DeLinde is not enough to establish a loss of the interest conveyed to Continental from H.W. McDonald. The documents also indicate that Mr. Huntley and two other McDonald assigns held interests in the lease. They do not name the grantor of any of the interests, however. The documents uniformly show Continental' claim

to one half of the working interest. We conclude that plaintiffs have failed to present substantial evidence to support a theory of adverse possession, waiver, or estoppel against Continental.

We therefore reverse the District Court. We hold that Continental owns an undivided one half interest in the working interest in the N½NW¼. We further hold that Gunnip and his assigns own the remaining half of the working interest in the N½NW¼. We remand to the District Court for entry of judgment establishing the ownership of the working interest in the N½NW¼ and for such further proceedings as are necessary in conformity with this opinion.

Fred J. Weber /s/
Justice

We Concur:

J.A. Turnage /s/
Chief Justice

John Conway Harrison /s/

William E. Hunt, Sr./s/

R.C. McDonough /s/
Justices

Leonard H. Langen /s/
Judge Leonard Langen sitting for Justice L.C. Gulbrandson.

Frank I. Haswell /s/
Retired Chief Justice Frank I. Haswell sitting for Justice John C. Sheehy.

No. 88-331

IN THE SUPREME COURT OF THE STATE OF MONTANA

1989

CONTINENTAL OIL COMPANY, a corporation,

Petitioner

- VS -

ELKS NATIONAL FOUNDATION, a legal entity; et al.

Respondents

PETITION FOR REHEARING
AND MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

ORIGINAL PROCEEDING:

COUNSEL OF RECORD:

For Petitioner:

Chris Mangen, Jr. argued, Crowley, Haughey, Hanson, Toole & Dietrich; Billings, Montana

For Respondents:

Gene Huntley argued, Baker, Montana

James L. Sandall for Amicus Curiae Frank A. Gunnip and

Robert P. Schwinn, Billings, Montana

Submitted: December 13, 1988
Decided: January 25, 1989

PETITION FOR REHEARING

Come now the McDonald Assignees, some of the respondents, and petition the court for rehearing with respect to its decision in the above case filed January 25, 1989. This petition is based upon the attached memorandum.

Dated January 27, 1989.

GENE HUNTLEY, P.C.
Office and Post Office Address
P. O. Box 760
Baker, Montana 59313

By s\ Gene Huntley
Attorney for the McDonald Assignees

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING BY THE MCDONALD ASSIGNEES

The court's decision strips from the McDonald Assignees property which they and their predecessor, Mr. H.W. McDonald, claimed since Mr. McDonald first received it by assignment from the McDonald & Eide Corporation July 12, 1955. Also, the McDonald Assignees under this claim of title received the income from the property from 1964 until 1984.

Even more importantly, if the McDonald Assignees are obliged to repay the income they received from the property they conceivably could lose the balance of their property and be in debt as well.

We do not suggest that serious or even catastrophic consequences entitle a litigant to relief. He is entitled as a matter of right and law, however, to

claim the tribunal pay careful attention to, and follow the law. This is the claim we are advancing in this petition for rehearing.

This court granted supervisory control because the lower court gave a full hearing (hours of argument and many briefs) to the McDonald Assignees and, after such hearings, ruled in their favor with thorough and meticulous findings, conclusions and judgment. This court said the lower court should not have fully considered the rights of the McDonald Assignees because by the language in the court's previous opinion the lower court was limited to determining if the McDonald Assignees had rights arising out of adverse possession, waiver or estoppel, and could consider no other claims, rights and defenses of the McDonald as-

signees.

In so ruling this court committed grave error.

First of all at the time of the rendition of the previous opinion the McDonald Assignees were not before this court. This court did not have jurisdiction of them and therefore had no right to in any way limit defenses they might wish to interpose or claims they might wish to make.

Secondly, the legal position of the McDonald Assignees was and is entirely different from that of Gunnip. Gunnip was entitled to prevail, we showed because Continental's title was derived form and inferior to that of Gunnip and because of judgments which Gunnip had obtained. The title of the McDonald Assignees, on the other hand, depended

upon an interpretation of the assignment McDonald gave and subsequent agreements between his assignees and Continental. The briefs that were submitted showed that there was different property, different parties, different evidence and different issues in the claims of the McDonald Assignees as distinguished from the claims of Gunnip.

What this court has done is deprive the McDonald Assignees of a day in court basing such denial upon obiter dicta in a case to which they were strangers.

We are aware that this court in refusing to consider most of the material relied upon by the lower court acted pursuant to the urging of Continental. This urging was briefed by the McDonald Assignees. As there was an issue made of this point in the briefs and as the case

turned upon this point we request and we feel, under the circumstances, we are entitled to request, that if this court does not grant a rehearing that it, at a minimum, articulate:

1. Why the McDonald Assignees as a matter of common morality and justice are not entitled to a hearing with respect to their case and their claims and defenses?

2. How the property of the McDonald Assignees could be stripped from them and their rights jeopardized in a proceeding in which they were neither parties nor participants?

3. Why the U.S. and Montana Constitutions relative to due process and United States statutes relative to civil rights do not apply?

CONCLUSION

The law, when consulted, leads inex-

orably to the conclusion that the McDonald Assignees are entitled to keep the property which they and Mr. McDonald have claimed for 34 years and from which they enjoyed all the income for 20 years.

They should be given a rehearing and the law should be followed.

Respectfully submitted this 27th day of January, 1989.

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By s\ Gene Huntley
Attorney for the McDonald Assignees

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FILED
FEB 25 1988
JEAN CAMERON
CLERK OF COURT

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, FALLON COUNTY

ELKS NATIONAL FOUNDATION, a legal entity; et al., Plaintiffs, -VS- CONTINENTAL OIL COMPANY, a corporation, et al., Defendants.	No. 5003 JUDGE JOE L. HEGEL

THIRD AMENDED COMPLAINT

The plaintiffs complain of defendants and allege:

COUNT ONE

(FOR PLAINTIFF, GENE HUNTLEY)

1.

Defendant, Continental Oil Company, is a corporation, a legal entity.

2.

Defendant, Shell Oil Company, is a corporation, a legal entity.

3.

Annexed to this complaint and marked "Exhibit A" is a copy of an oil and gas lease on the N½ of Section 8, Township 7N, Range 60E, M.P.M. in Fallon County, Montana. Said lease, from its date, June 8, 1953, at all times has been, and now is, in full force and effect.

4.

Defendant, Shell Oil Company, is the "unit Operator" of said oil and gas lease. As such Unit Operator its duties are to produce the described property together with other oil and gas wells on

adjacent property, sell the production and allocate the proceeds of the production to the royalty owners and working interest owners, according to their ownership.

5.

The working interest in the lease is .845% of the production.

6.

Defendant, Frank A. gunnip, as liquidating trustee, aforesaid, and his assignees, plaintiff Huntley and defendant Schwinn, are entitled to one-fourth of the working interest in said lease on the NW¼ of Section 8, Township 7N, Range 60E, M.P.M..

7.

In fact defendant, Shell Oil Company, has not paid and is not paying Frank A. Gunnip, liquidator as aforesaid, and

his assignees, plaintiff Huntley and defendant Schwinn, 25% of the income referable to said tract but only one-eighth of the income referable to said tract.

8.

Defendant, Continental Oil Company, claims to own a working interest owner in said lease. The interest of Continental Oil Company is not more than a three-eights interest. Defendant, continental Oil company, has been overpaid by defendant, Shell Oil company, because it has received and is continuing to receive one-half of the production.

9.

The distribution of the proceeds from the production of the indicated lease has been made wrongfully and in the fashion indicated for several years.

However, plaintiff Gene Huntley did not discover the wrongful application until the summer of 1982.

10.

Defendant oil companies have refused to remedy the wrongful allocation and payment and distribution although demanded to do so.

11.

Defendant oil companies should be required to account to plaintiff Gene Huntley for their management of said lease and unit agreement. Because the agreements under which said plaintiff claims required the delivery to him or his order of crude oil and natural gas he is entitled to rely on the provisions of Section 27-1-320 M.C.A. and therefore said defendants should be required to account to said plaintiff, from the time

lis pendens was filed in Fallon County Civil 4062 on March 7, 1967, until the present, on a monthly basis, for all oil production and also all natural gas production from the NW¼ of Section 8, Township 7N, Range 60E, M.P.M., and to show all expenses incurred and paid in connection with said production, and to show also on a monthly basis the amount received from the sales of natural gas and crude oil so that the sales price of the natural gas and crude oil with interest from March 7, 1967, as well as the highest market value of said natural gas and crude oil between the time it was produced but not paid over to the present may be calculated from said accounting.

12.

Plaintiff, Gene Huntley, is also entitled to a reasonable attorneys fee

under the provisions of said Section 27-1-320 for the bringing and prosecution of this lawsuit.

13.

The relationship between the plaintiff Gene Huntley and defendant oil companies was a fiduciary relationship. Said plaintiff had a right to demand and expect from defendants full, fair, open and honest disclosures of everything affecting the relationship and a correct and prompt payment of all income earned by the interests that said plaintiff owned. Defendant oil companies have breached the duties of fiduciary relationship by failing to make a full, fair, open and honest disclosure of everything affecting the relationship, by failing to pay over to the plaintiff Gene Huntley his just share of the proceeds form the

aforesaid lease and by failing and refusing to pay over his proper share of the proceeds of the lease to him when demanded to do so. That by reason of their intentional breach of the aforesaid fiduciary duties defendant oil companies should be required to pay to said plaintiff, in addition to compensatory damages, punitive damages in an amount sufficient to deter them from such conduct in the future. Plaintiff asks the court to award to the plaintiff Gene Huntley punitive damages in the amount of $50,000,000.00 against the defendant oil companies.

14.

Defendants, Frank A. Gunnip, Liquidating Trustee of McDonald & Eide, Incorporated, a corporation and Robert P. Schwinn have refused to join in this

second amended complaint as plaintiffs and are therefore joined as defendants.

COUNT TWO

(FOR PLAINTIFFS, ELKS NATIONAL FOUNDATION, a legal entity; FLOYD R. YOUNG; CHAD RANDALL YOUNG, by his guardian SHERRY L. YOUNG; JOSHUA LEE YOUNG, by his guardian SHERRY L. YOUNG; MICHAEL EDWIN MAXWELL by his guardian SHIRLEY G. JOHNSON; CORINNA NELL MAXWELL, by here guardian SHIRLEY G. JOHNSON; LOIS E.LaRUE RIGGINS; RANDY YOUNG; SHERRY L. YOUNG; JAMES BYRD; JOSEPH EDWIN MAXWELL, JR., BETTY WILSON, THOMAS A. LARSON and GENE HUNTLEY)

15.

This count of the complaint refers to plaintiffs, Elks National Foundation, a legal entity; Floyd R. Young; Chad Randall Young, by this guardian Sherry L.

Young; Joshua Lee Young, by his guardian Sherry Sherry L. Young; Michael Edwin Maxwell, by his guardian Shirley G. Johnson; Corinna Nell Maxwell, by her guardian Shirley G. Johnson; Lois E. LaRue Riggins; Randy Young; Sherry L. Young; James Byrd; Joseph Edwin Maxwell, Jr.; Betty Wilson; Thomas A. Larson and Gene Huntley. Said plaintiffs and defendant, Jeff T. Stites, are the successors in interest to H. W. McDonald. They will be referred to in this count of the complaint as the "McDonald Assignees".

16.

Defendants, Continental Oil Company and Shell Oil company, are corporations, legal entities, doing business in the state of Montana.

17.

The Elks National Foundation is a

legal entity.

18.

July 12, 1955, H.W. McDonald became the owner of the lease (Exhibit A) by assignment insofar as the lease related to the following described land, to-wit:

S½NW¼ and an undivided one-half interest in the N½NW¼, Section 8, Township 7N, Range 60E of M.P.M., Fallon County, Montana.

A copy of said assignment is hereunto annexed and marked "Exhibit B".

19.

H.W. McDonald is deceased. The McDonald assignees are the successors in interest to the ownership of H.W. McDonald and own all of the interest of H.W. McDonald described herein. Jeff T. Stites has refused to join in this suit as a plaintiff and pursuant to Rule 19(a) M.R.Civ.P. is therefore joined as a defendant.

20.

November, 13, 1961 Vernon E. Eide and Jacob Von DeLinde caused to be placed of record in Fallon County, Montana in the office of the Clerk and Recorder (Book 48 of Misc., page 519) a fraudulent conveyance purporting to be an assignment of the entire lease form McDonald & Eide, Incorporated to them. A copy of said assignment is hereunto annexed and marked "Exhibit C".

21.

June 13, 1960 H.W. McDonald in Fallon County Civil Cause No. 3679 filed a complaint against the McDonald & Eide Corporation to, inter alia, quiet title to the interest which had been assigned to him by the corporation as set forth herein. This suit was successful and

title to the property assigned to him was quieted in H.W. McDonald on June 16, 1964. See Fallon County Civil No. 3679, the judgment in which is incorporated herein by reference.

22.

February 27, 1962 while the lawsuit against the corporation, McDonald & Eide, Inc., by Mr. H.W. McDonald was pending, as aforesaid, Vernon M. Eide and J. Von DeLinde, claiming to be the owners of the entire leasehold entered into a "Farmout Agreement" with Continental Oil company, a copy of which is annexed hereto and marked "Exhibit D". Pursuant to the farmout agreement Eide and Von DeLinde executed an assignment, a copy of which is hereunto annexed and marked "Exhibit E" and an "Operating Agreement", a copy of which is hereunto annexed and marked

"Exhibit F". While the assignment assigns to Continental "- - an undivided one-half (1/2) of that - - lease - -" and the "Farmout Agreement" provided, "prior to the commencement of the test well, farmouters shall assign unto Continental an undivided one-half interest in and to said lease insofar as it covers said lands." (Farmout agreement page 3), it is obvious from reading the entire agreement between Continental Oil Company and Eide and Von DeLinde that Eide and Von DeLinde intended to assign and Continental intended to receive not a one-half interest in the lease but one-half of what Eide and Von DeLinde claimed to own in sid lease. The lease was burdened with a landowner's royalty of 12½% and an overriding royalty of 3% so while the transfer documents speak of an assignment

of one-half of the lease it is clear that what the parties intended was that Eide and Von DeLinde would transfer one-half (42.225%) of what they claimed to own (84.5%) rather than the 50% interest described in the operative documents.

23.

During the pendency of his lawsuit against McDonald & Eide, Inc. and while Continental Oil Company and Eide and Von DeLinde were negotiating with respect to the "Farmout Agreement" and related documents representatives of Continental Oil Company approached H.W. McDonald and told him that they were willing to drill and develop the lease and would do so if he would ratify the agreement that Continental had made with Eide and Von DeLinde. Continental Oil company wanted the ratification so that in the event that McDon-

ald was successful in his claim Continental would still own a one-half of the working interest in the lease. McDonald wanted the property developed and agreed to ratify the agreement made with Continental by Eide and Von DeLinde. A copy of said ratification is hereunto annexed and marked "Exhibit G".

24.

The ratification agreement between McDonald and Continental conveyed to Continental one-half of McDonald's three-quarter interest in the NW¼ Section 8, Township 7N, Range 60E of M.P.M., not a one-half interest in the entire lease. That this is so is shown by:

1. The agreement ratified an agreement which itself conveyed the one-half of what the transferors owned in the property not one-half of the entire pro-

perty.

2. The agreement was given so that Continental Oil company would still own one-half of the working interest in the lease if McDonald won his case, not to give Continental a greater interest than one-half the working interest.

3. It is not reasonable and contrary to oil field custom and usage that Mr. McDonald would have assigned all of his interest in any separate tract in an exploratory drilling venture.

25.

June 16, 1964 H.W. McDonald won his case, Fallon County Civil No. 3679, referred to above, and judgment was entered in his favor quieting his title to all of the S½NW¼ and an undivided one-half interest in the N½NW¼ of said lease. H.W. McDonald conveyed his interest in said

lease to Donald C. Iverson, Alvin Larson and Gene Huntley.

26.

July 16, 1964 Continental confirmed in writing that the intent and effect of the McDonald ratification, Exhibit G, was to convey one-half of what McDonald owned in the property in question (a three-fourths interest) not one-half of the property. See the letter from C. R. Hampton hereunto annexed and marked "Exhibit H". In that letter Continental said:

> "The other day in our telephone conversation, when I discussed with you the effect of the Judgment obtained by Mr. H. W. McDonald, pertaining to the subject lease, I believe we agreed that the working interest ownership of Section 8:

NW¼, T7N, R60E, is now owned by the following parties, in the following proportions:

Section 8: S½NW¼

Continental Oil Company: 42-1/4%

Gene Huntley: 21-1/8%

Donald C. Iverson, Trustee: 10-9/16%

Alvin Larson, Trustee: 10-9/16%

84-1/2%

Section 8: N½NW¼

Continental Oil Company: 42-1/4%

Vernon M. Eide and J. Von DeLinde: 21-1/8%

Gene Huntley: 10-9/16%

Donald C. Iverson, Trustee: 5-9/32%

Alvin Larson, Trustee: 5-9/32%

84-1/2%"

The letter confirms that the inter-

est of the H. W. McDonald assignees, Huntley, Iverson and Larson was 42-1/2% in the S½NW¼(1/2 of the interest originally assigned to H.W. McDonald in that property) and 21-1/8% in the N½NW¼ (again 1/2 of the interest originally assigned to H.W. McDonald).

After the giving of the ratification by McDonald to Continental Oil Company on May 24, 1962, Continental Oil Company agreed with the McDonald assignees that the effect of the agreement was that McDonald assigned one-half of what he owned (a 3/4ths interest) rather than one-half of the lease in his ratification agreement with Continental.

27.

July 29, 1964 Continental Oil Company again confirmed that the effect of the McDonald ratification was that it ac-

quired by the ratification one-half of Mr. McDonald's three-fourths interest not one-half of the property. See "Exhibit I" hereunto annexed. The "Oil Division Order" annexed to the letter was prepared by Continental Oil Company and and accepted by Huntley, Iverson and Larson, the then H.W. McDonald assignees. It provided that the interest of Huntley, Iverson and Larson was a total of .316875 of the lease on the NW¼. This decimal figure is precisely one-half of the three-fourths ownership in the 84.5% working interest of the lease in the NW¼. This document is a recognition by Continental that the ratification by H. W. McDonald conveyed but one-half of what he owned, a three-fourths interest, not one-half of the lease and it is an agreement by Continental Oil Company as to the

interest and extent of the ownership of the H. W. McDonald assignees.

28.

Following the execution of the "Oil Division Orders" by the McDonald assignees, as aforesaid, in July of 1964, Continental commenced and the eventual operator of the lease, defendant Shell Oil Company, continued to pay the McDonald assignees on the basis that they were the owners of a three-fourths working interest in the NW¼ of Section 8, Township 7N, Range 60E M.P.M. That such recognition of the McDonald assignees as the owners of a three-fourths interest as aforesaid and recognition of the McDonald ratification as conveying a three-fourths interest and not more continued until October 22, 1984 when, after a period of more than 20 years, defendant oil companies

claimed that the McDonald ratification and assignment constituted a conveyance by McDonald of all of his interest (one-half) in the N½NW¼ and one-half of his interest in the S½NW¼, claiming, thereby, a one-eighth greater interest than previously. See "Exhibit J" hereunto annexed where defendant Shell Oil Company accords validity to the claim of Continental Oil Company and gives notice that it was going to withhold one-third of the earnings attributable to the property. An identical or similar letter was sent to each of the McDonald assignees herein or their predecessors in title and Shell Oil company has refused to pay to the McDonald assignees their correct share of the proceeds of said lease ever since.

29.

Defendant oil companies are obliged

by their agreements with McDonald to pay 3/4ths of the working interest income from the NW¼ of said lease to the McDonald assignees.

30.

Defendant oil companies are barred by the doctrine of estoppel from asserting that the McDonald assignees have less than a three-fourths interest in the NW¼ Section 8, Township 7N, Range 60E M.P.M.

31.

Defendant oil companies are barred by the doctrine of laches from asserting that the McDonald assignees have less than a three-fourths interest in the NW¼ of Section 8, Township 7N, Range 60E M.P.M.

32.

Defendant oil companies are precluded by the statute of limitations from

asserting that the McDonald assignees have a less interest than three-fourths of the lease on the NW¼ of Section 8, Township 7N, Range 60E M.P.M.

33.

Defendant oil companies should be required to account to the McDonald assignees for their management of said lease and unit agreement. Because the agreements under which said plaintiffs claim require the delivery to them or their order of crude oil and natural gas they are entitled to rely on the provisions of Section 27-1-320 M.C.A. and therefore said defendant oil companies should be required to account to said plaintiffs, from October 22, 1984 until the present, on a monthly basis, for all oil production and also all natural gas production from the NW¼ of Section 8,

Township 7N, Range 60E, M.P.M., and to show all expenses incurred and paid in connection with said production and to show also on a monthly basis the amount received from the sales of said natural gas and crude oil so that the sales price of the natural gas and crude oil with interest from October 22, 1984 until present as well as the highest market value of said natural gas and crude oil between the time it was produced but not paid over and the present may be calculated from said accounting.

34.

The McDonald assignees are also entitled to reasonable attorneys fees under the provisions of said Section 27-1-320 for the bringing and prosecution of this lawsuit.

35.

There has been no delay in the bringing of this suit. Although more than two years have elapsed since payments were wrongfully withheld by said oil companies the delay was occasioned by the specific request of defendant Shell Oil Company. See "Exhibit K" hereunto annexed in which Shell Oil company promised that if Gunnip, Huntley & Schwinn prevailed on appeal when this case was initially appealed then it wouldn't be necessary to bring a suit on behalf of the McDonald assignees and asking Gene Huntley, as the representative of the McDonald assignees, to "- - defer filing suit on behalf of yourself and the successors to the two trustees against Shell and Continental until after the Montana Supreme Court decides case 5003". As the record in this case shows Gunnip, Huntley

and Schwinn did prevail, on appeal, in case 5003, the within litigation, securing a reversal of the lower court's grant of summary judgment against them. Shell Oil Company, despite its promise, refused to resume payments to the McDonald assignees. Fewer than two years have elapsed since the rendition of the supreme court opinion for which the McDonald assignees were requested to wait.

36.

In certain litigation entitled "Frank Gunnip, as Receiver of McDonald & Eide Corporation vs. Vernon Eide, Alice L. Eide, Ralph M. Stapp, Jacob Von DeLinde, et al, Fallon County, Montana Civil No. 4062" Frank Gunnip, as Receiver of McDonald & Eide, Incorporated, brought a proceeding to recover the aforesaid lease which had been transferred, fraudulently,

by officers of the defunct corporation, McDonald & Eide, Incorporated, to themselves. This action was brought February 23, 1967 and from about that time until 1982 all the funds attributable to the interest claimed were held by defendant Shell Oil Company, the operator of the oil and gas lease in question, to be paid to the successful litigant. Frank Gunnip was the successful litigant and was entitled to recover all of the earnings allocable to the interest which he owned as Receiver. See the judgments in Fallon County Civil No. 4062 which are incorporated herein by reference. In 1982 when demand was made by Frank Gunnip for the withheld funds defendants Shell Oil Company and Continental Oil Company formed and executed a plan to defraud Frank Gunnip and the owners of the McDonald &

Eide, Incorporated assets of the funds which belonged to them. The defendants simply kept a large part of said funds and unlawfully, maliciously and fraudulently converted said funds to their own use and benefit. The exact amount of funds withheld and converted is unknown because the oil company defendants, although demanded and ordered to do so have never accounted to plaintiffs for the income realized from said property. When the fraud, aforesaid, of the oil company defendants was discovered and demand was made for said funds they persisted in their fraud and chicane claiming without any reasonable basis and against all law and evidence that they had a right to the funds which they had unlawfully converted. Their obstinate fraud necessitated the filing of this lawsuit, initially, by

the plaintiffs, Gunnip, Huntley & Schwinn. The title of Gunnip, Huntley & Schwinn and entitlement to the funds, as aforesaid, have now been declared and settled by the courts of this state. Said defendant oil companies persist in their unlawful and fraudulent claims and conversions even in the face of a final judgment of the courts of this state.

37.

The persistently unlawful, malicious and fraudulent character and intent of defendant oil companies in their determination to withhold the funds they converted is shown by the fact that after the commencement of the within litigation and after it had become readily apparent and obvious the defendants oil companies had not right to claim the additional one-eighth share as against Gunnip, Hunt-

ley & Schwinn, they proceeded to claim an additional one-eighth share from the McDonald assignees and to withhold from them and convert to their own use and benefit one-third of the proceeds of the lease allocable to the various McDonald assignees. At the same time they refused to pay over to Huntley, Gunnip and Schwinn their one-eighth of the proceeds of said lease.

38.

The acts of the oil corporation defendants in cheating and defrauding all of the plaintiffs and in continuing to do so shows them to be wholly corrupt, motivated entirely by greed, devoid of any desire to faithfully and honestly execute their contracts with plaintiffs, fraudulent, dishonest and derelict in performing their fiduciary duties to plaintiffs.

39.

As defendant oil companies have acted in this case with willful malice and fraud and intentionally contrary to their duties under the contract and as fiduciaries this is a proper case for the imposition of punitive damages. Punitive damages in an amount sufficient to deter defendants from such conduct in the future and sting them, to deter others from such conduct, to serve as example and to punish defendants are Fifty Million Dollars and plaintiffs demand punitive damages in that amount.

COUNT THREE

40.

Plaintiffs replead paragraphs 15 through 39 of the Second Count of the Second Amended Complaint.

41.

Defendant Continental Oil Company has repudiated the agreement between itself and the plaintiffs predecessor in interest, H. W. McDonald. Plaintiffs are entitled, by reason of such repudiation, to declare said contract rescinded and plaintiffs do hereby declare the contract referred to herein between Continental Oil Company, defendant and the plaintiffs to be rescinded and they request the court to declare that the contract is, in fact, rescinded and to declare, further, that said contract is cancelled and to require defendant Continental Oil Company to delver up for cancellation the agreement between it and Mr. H. W. McDonald dated May 24, 1962, recorded in Book 53 of Miscellaneous at page 187 of the Fallon County Records for cancellation.

WHEREFORE plaintiffs pray judgment

against the defendants as follows:

On the First Count for plaintiff, Gene Huntley:

1. That the defendant oil companies be required to account to plaintiff, Gene Huntley, for their management of the lease and unit agreement described in the complaint, on a monthly basis, for all oil production and also all natural gas production from the NW¼ of Section 8, Township 7N, Range 60E, M.P.M., and to show all expense incurred and paid in connection with said production and to show also, on a monthly basis, the amount received from the sale of said natural gas and crude oil so that the sales price of the natural gas and crude oil, with interest from March 7, 1967, as well as the highest market value of said natural gas and crude oil between the time it was

produced but not paid over and the present may be calculated from said accounting.

2. For a reasonable attorneys fees.

3. That the interest of Continental Oil Company in the NW¼ of Section 8, Township 7N, Range 60E, M.P.M. by virtue of the oil and gas lease described in the complaint be declared judicially as not exceeding a three-eights interest in said oil and gas lease.

4. That the defendants be required to pay over to the plaintiff, Gene Huntley, as damages, all income attributable to but not paid calculated as provided in paragraph one of the prayer of this complaint.

5. For the sum of Fifty Million Dollars punitive damages from the defen-

dant oil companies.

6. For costs of suit.

7. For such other, further and different relief as to the court may seem meet and just.

For the McDonald Assignees:

Count Two.

8. That the defendant oil companies be required to account to the McDonald assignees for their management of said lease and unit agreement and to account to said plaintiffs, from the October 22, 1984 until the present, on a monthly basis, for all oil production and also all natural gas production from the NW¼ of Section 8, Township 7N, Range 60E, M.P.M. and to show all expenses incurred and paid in connection with said production and to show also on a monthly basis the amount received from the sales of

said natural gas and crude oil so that he sales price of the natural gas and crude oil so that the sales price of the natural gas and crude with interest from October 22, 1984 as well as the highest market value of said natural gas and crude oil between the time it was produced and not paid over and the present may be calculated form said accounting.

9. For a reasonable attorneys fee.

10. That the interest of Continental Oil Company in said oil and gas lease be judicially declared to be not more than three-eighths interest in the N½ of NW¼ of Section 8, Township 7N, Range 60E, M.P.M..

11. That defendant oil companies be required to pay over to plaintiff McDonald assignees all sums found to be due them on the rendition of the accounting

herein prayed for.

12. For the sum of Fifty Million Dollars punitive damages from the defendant oil companies.

13. For costs of suit.

14. For such other, further and different relief as to the court may seem meet and just.

15. That the agreements between H. W. McDonald and Continental Oil Company be declared by the court to be rescinded and that the document, a copy of which is annexed to the complaint as Exhibit "G" be delivered up to the court for cancellation.

Dated this 25th day of February, 1988.

GENE HUNTLEY, P.C.
Office and Post Office Address
P. O. Box 760
Baker, Montana 59313

By s\ Gene Huntley
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail upon all attorneys of record at their address or addresses this 25th day of February, 1988

Gene Huntley, P.C.
Office and Post Office Address
P. O. Box 760 Baker, Montana 59313

BY s\ Peggy Niemerg

[NOTE: Exhibits A, C, D, F, have not been copied and annexed. It was not felt they were necessary for a full understanding of Petitioner's position.]

137340

Book 55
Page 32

Assignment of Oil and Gas Lease

Whereas, On the 8th day of June, 1953 a certain oil and gas mining lease was made and entered into by and between William P. Knox, (a single man) 2107 Lincoln, St. Paul, Minnesota Mrs. Marcia Knox Orrock and Robert Orrock, (husband and wife) Mt. Vernon, RFD #6, Washington Lessors and Frank H. Becker Lessee, covering the following described land in the County of Fallon and State of Montana to-wit:

North Half (N½) os Section 8, Township 7 North, Range 60 East, MPM

Said lease being recorded in the office of County Clerk and Recorder of said County in book 31 Page 224, and

Whereas, The said lease and all rights thereunder or incident thereto are

"EXHIBIT B" - 185 -

now owned by McDonald & Eide, Incorporated of South St. Paul, Minnesota, subject to a three percent (3%) overriding royalty reserved unto Frank H. Becker and others.

Now, Therefore, For and in consideration of One Dollar, (and other good and valuable considerations,) the receipt of which is hereby acknowledged, the undersigned, the present owner of the said lease and all rights thereunder or incident thereto, does hereby, bargain, sell, transfer, assign and convey unto H.W. McDonald, Trustee (subject to above overriding royalty) all of its right, title and interest of the original lessee and present owner in and to the said lease and rights thereunder, in so far as it covers the South Half of the Northwest Quarter (S½NW¼) of Section 8, T7N, R60E.,

and 50 % of its interest undivided in the North Half of the Northwest Quarter (N½ NW¼) of Section 8, T7N, R60E, subject also to the above three percent (3%) overriding royalty reserved unto Frank H. Becker and others. together with all personal property used or obtained in connection therewith to H.W. McDonald, Trustee and his heirs, successors and assigns.

In Witness Whereof, The undersigned owner and assignor has signed and sealed this instrument this 12th day of July, 1955

McDonald & Eide, Incorporated

By s\ Alice L. Eide
Alice L. Eide, President

Attested:
s\ Vernon M. Eide
Vernon M. Eide, Secy/Treas.

STATE OF Minnesota)
: SS.
COUNTY OF Dakota)

On this 13 day of July, in the year 1955, before me, Ralph M. Stapp, a Notary Public, personally appeared Alice L. Eide, known to me to be the President of the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

s\ Ralph M. Stapp
Notary Public
My commission expires
October 8, 1959

No. 137340

Assignment of Oil and Gas Lease

STATE OF Montana)
: ss.
COUNTY OF Fallon)

This instrument was filed for record on the 15 day of May, 1963, at 4:55 P.M. book _____ page _____ of the misc.

records of this office.

s\ R. R. Stevens
County Clerk and Recorder

Fee $4.00

By _____
Deputy

ASSIGNMENT

THIS ASSIGNMENT, made and entered into this 22nd day of May, 1962, by and between VERNON M. EIDE and J. VON DeLINDE, individuals, hereinafter called "Assignors", and CONTINENTAL OIL COMPANY, a Delaware corporation, hereinafter called "Assignee",

W I T N E S S E T H:

For and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration in hand paid, Assignors do hereby grant, bargain, sell, transfer, convey and set over unto Assignee an undivided one-half (1/2" of that certain oil and gas lease (hereinafter called "said lease", dated June 8, 1953, from William P. Knox, a single man, and Mrs. Marcia Knox Orrock

and Robert Orrock, husband and wife, as lessors, to Frank H. Becker, as lessee, recorded in Book 31 at Page 224 of the records of Fallon County, Montana, insofar as said lease covers the following described lands (hereinafter called said lands) located in said county, to-wit:

Township 7 North, Range 60 East
Section 8: N½

subject to a 3% overriding royalty.

Assignee agrees to bear and pay an undivided one-half (1/2) of the landowner's royalty and of the overriding royalty not in excess of three per cent (3%) burdening the above described lease.

If any party desires to surrender its interest under said lease insofar as it covers the said lands, or any portion thereof, such party shall so notify the others in writing. The parties receiving such notice shall then have a period of

thirty (30) days within which to elect, in writing, to receive an assignment of the interest desired to be surrendered. If such election is made, the party desiring to surrender shall assign to the other parties all of his or its right, title and interest in and to the said lease, or portion thereof covering the interest desired to be surrendered. If such election is not made, the parties shall join in surrendering said lease as to said lands or portion thereof covering the interest desired to be surrendered.

Alice L. Eide, the wife of the undersigned Vernon M. Eide, and Katherine A. Von DeLinde, the wife of the undersigned, J. Von DeLinde, join in the execution of this assignment for the purpose of releasing their dower interest, if any.

EXECUTED as of the day and year first above written:

Vernon M. Eide/s/
Vernon M. Eide

Alice L. Eide/s/

J. Von DeLinde/s/
J. Von DeLinde

Katherine A. Von DeLinde/s/

CONTINENTAL OIL COMPANY

BY F.W. McWilliams/s/
Attorney-in-Fact

STATE OF MINNESOTA)
) ss.
COUNTY OF DAKOTA)

On this 22nd day of May, 1962, before me a Notary Public, personally appeared Vernon M. Eide and Alice L. Eide, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that he executed the same.

Given under my hand and seal this 22nd day of May, 1962. My commission expires July 26, 1967.

Kenneth A. Benson/s/

Notary Public

(SEAL)

South St.Paul, Minn.

Residence

STATE OF MINNESOTA)

) ss.

COUNTY OF DAKOTA)

On this 22nd day of May, 1962, before me a Notary Public, personally appeared J.Von De Linde and Katherine A. Von De Linde, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged

to me that he executed the same.

Given under my hand and seal this 22nd day of May, 1962. My commission expires July 26, 1967.

Kenneth A. Benson/s/

Notary Public

South St. Paul, Minnesota

Residence

STATE OF MONTANA, COUNTY OF FALLON

Filed for record Aug 27, 1962

at 8:05 A.M. Recorded in Book ____

of Misc at Page

$1.00

R.R. Stevens/s/

County Clerk and Recorder

of Fallon County, Montana

STATE OF COLORADO)

) ss.

CITY AND COUNTY OF DENVER)

On this 5th day of June, 1962, before me, the undersigned Notary Public, personally appeared F. W. McWilliams, personally known to me to be and who, being by me duly sworn, did say that he is the person who is described in the within and foregoing instrument as Attorney in Fact of CONTINENTAL OIL COMPANY, a Delaware corporation, and who, as such Attorney in Fact, subscribed, signed and executed said instrument and he duly acknowledged to me that as such Attorney in Fact he subscribed, signed and executed said instrument as his free and voluntary act and deed on behalf of

and as the free and voluntary act and deed of said CONTINENTAL OIL COMPANY, as principal, and for the purposes therein contained and by authority of a resolution of its Board of Directors.

My commission expires October 2, 1965

Witness my hand and official seal.

Jean I. Hollister/s/

Notary Public (signature)

Notary's name (Typed or Printed)

Denver, Colorado

Notary's Residence**

*Required in North Dakota.

**Required in Utah and Montana.

43170

CERTIFICATE

STATE OF MONTANA)

County of Fallon) ss.

I hereby certify that this sheet and all sheets identified by my impression of my Official Seal, are each and all true and correct copies of originals recorded in my office on the 27th day of August, 1962 at 8:05 o'clock A.M. under Document Number 135597, Bk 53, pge 184-186.

IN TESTIMONY WHEREOF I have hereunto set my hand and my official seal of Office the 26th day of September, A.D., 1984.

Mary Lee Dietz/s/

County Clerk & Recorder

By_____

Deputy.

135598

BOOK 53
PAGE 187

RATIFICATION AND ADOPTION OF ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS THAT

WHEREAS, by assignment dated the 24th day of May, 1962, a true copy of which is attached hereto marked Exhibit "A" for identification, VERNON M. EIDE and J. VON DE LINDE purported to assign to CONTINENTAL OIL COMPANY, a Delaware corporation, an undivided one-half (½) interest in a certain oil and gas lease dated June 8, 1953, from William P. Knox, a single man, and Mrs. Marcia Knox Orrock and Robert Orrock, husband and wife, as lessors, to Frank H. Becker, as lessee, recorded in Book 31 at page 224 of the records of Fallon County, Montana, insofar as said lease covers the following

"EXHIBIT G" - 199 -

described lands in said county, to-wit:

Township 7 North, Range 60 East

Section 8: N½,

subject to a 3% overriding royalty;

and

WHEREAS, the undersigned, H.W. McDONALD contends that he is the rightful owner of said oil and gas lease.

NOW, THEREFORE, in consideration of the sum of Ten Dollars ($10.00) in hand paid to the undersigned, the receipt and succiciency of which is hereby acknowledged, the undersigned, H. W. McDonald, does hereby ratify, adopt and confirm said assignment, in all things with the same force and effect as if the undersigned had been named the assignor therein and had duly executed and delivered said assignment to Continental Oil

Company.

For the same consideration, the undersigned does hereby transfer, assign, set over and convey unto Continental Oil Company an undivided one-half (½) interest in the oil and gas lease above described and in the leasehold estate created thereby on the same terms and conditions as are set forth in the assignment attached hereto marked Exhibit "A".

The execution of this ratification and adoption of assignment shall never be construed or considered to be evidence of any recognition by the undersigned of the validity of any claim by Vernon H. Eide and J. Von De Linde of the ownership of the aforesaid oil and gas lease; and the undersigned does hereby expressly deny the validity of any such claim by Vernon

M. Eide and J. Von De Linde, and on the contrary does hereby assert that the undersigned, H. W. McDonald, is the legal and equitable owner of said oil and gas lease, and the execution of this agreement shall not be construed as a waiver of the right of H. W. McDonald to bring any appropriate court action or suit for the protection of his interest or the recovery of any money accrued by reason thereof.

Dated this 24th day of May, 1962.

H. W. McDonald/s/
H. W. McDONALD

STATE OF MONTANA)
) ss
COUNTY OF FALLON)

On this 24th day of May, 1962, before me, the undersigned Notary Public for said State, personally appeared H. W. McDONALD, known to me to be the person whose name is subscribed to the within

instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year in this certificate first above written.

Gene Huntley/s/

Notary Public for the State of Montana
Residing at Baker, Montana
My commission expires July 28, 1962

(SEAL)

STATE OF MONTANA, COUNTY OF FALLON

FILED FOR RECORD Aug 27, 1962

at 8:05 A.M. Recorded in Book _____

of Misc on Page _____

Fee $4.00

R.R. Stevens/s/

County Clerk and Recorder
of Fallon County, Montana

By _____
Deputy

CONTINENTAL OIL COMPANY
LEGAL DEPARTMENT

1755 GLENARM PLACE
DENVER 2, COLORADO

July 16, 1964

Mr. Gene Huntley,
Attorney at Law,
Baker, Montana.

RE: Division Order No. 15104
Schuldt-Orrock Lease
Fallon County, Montana
Lease No. 147453

Dear Mr. Huntley:

The other day in our telephone conversation, when I discussed with you the effect of the Judgment obtained by Mr. H. W. McDonald, pertaining to the subject lease, I believe we agreed that the working interest ownership of Section 8: NW¼, T7N, R60E, is now owned by the following parties, in the following proportions:

Section 8: S½NW¼

Continental Oil Company: 42-1/4%

Gene Huntley: 21-1/8%

Donald C. Iverson, Trustee:

10-9/16%

Alvin Larson, Trustee: 10-9/16%

84-1/2%

Section 8: N½NW¼

Continental Oil Company: 42-1/4%

Vernon M. Eide and J. Von DeLinde: 21-1/8%

Gene Huntley: 10-9/16%

Donald C. Iverson, Trustee:

5-9/32%

Alvin Larson, Trustee: 5-9/32%

84-1/2%

The subject lease is, of course, burdened by a 12-1/2% landowner's royalty, and a 3% overriding royalty.

Since our telephone conversation, it has been brought to my attention that the Montana Oil and Gas Conservation Commission, by Order No. 20-62, dated February

10, 1962, spaced the subject area, and provided for 160-acre spacing units, each such spacing unit to comprise a quarter section. Thus, the NW¼ of Section 8 comprises a spacing unit, and it would appear that each working interest owner in this quarter section is entitled to a proportionate share of production allocated to such 160-acre spacing unit. Under the Montana Commission's Order No. 20-62, it would seem that production allocated to the NW¼ would thus be owned by the working interest owners on the following basis:

Continental Oil Company:	42-1/4%
Vernon M. Eide and J. Von DeLinde:	10-9/16%
Gene Huntley:	1/2 x 31-11/16%
Donald C. Iverson, Trustee:	1/4 x 31-11/16%

Alvin Larson,

Trustee: 1/4 x 31-11/16%

84-1/2%

If you advise that the division of interests, set forth immediately above, is satisfactory to you and Messrs, Iverson and Larson, we shall promptly forward division orders to you, reflecting this allocated ownership. However, if this is not the intended effect of the judgement obtained by Mr. McDonald, then it will be necessary for you to obtain a relinquishment from Eide and Von DeLinde as to any interest in proceeds from production allocated to said Section 8: NW¼, or, perhaps you might wish to amend the judgment, specifically authorizing and directing Continental to ignore the interest of Eide and Von DeLinde with respect to proceeds form production allocated to

said quarter section.

If you have any questions concerning the foregoing, would you please call me. I am sure you understand that we must continue to hold in suspense the interest here in question until this matter is resolved. I am hopeful that this matter may be resolved at an early date in order that we might look forward to an early release of payments.

If we can be of any assistance to you, please do not hesitate to call on us.

Very truly yours,

s\ C. R. Hampton
C. R. Hampton

CONTINENTAL OIL COMPANY
P. O. DRAWER 1267
PONCA CITY, OKLAHOMA
July 29, 1964

Address reply to:
Attn. of Lloyd Roach
Refer to File DO 15104

Mr. Gene Huntley
Attorney-at-Law
Baker, Montana

Dear Mr. Huntley:

The title material on the Schulcz-Orrock Lease in Fallon County, Montana, which you submitted to our Mr. C. R. Hampton in our Denver Legal Department has been copied; and I am returning to you herewith all of the material you furnished us along with copies of our oil division order showing ownership in accordance with Mr. C. R. Hampton's letter to you dated July 16, 1964.

If the enclosed copies of the division order meet with approval, they

should be executed by Huntley, Iverson, and Larson; and one copy of each should be returned to us. Of the six copies enclosed, three may be retained by the owners for file copies. The enclosures may be executed in counterpart. All signatures should be properly witnessed, and correct mailing addresses should be inserted on our copies of the division orders before they are returned to us.

Yours very truly,
s\ Lloyd Roach
Lloyd Roach
Division Order Section
Crude Oil Trading Depart
ment

CONTINENTAL OIL COMPANY
OIL DIVISION ORDER

D.O. NO. 15104

EFFECTIVE First Run, 1962

To CONTINENTAL OIL COMPANY
Ponca City, Oklahoma

The undersigned certify and guarantee that they are the legal owners of and hereby warrant title to their respective interests as set out below in all oil produce from Schuldt - Orrock Farm or Lease, more particularly described as NW/4 Section 8, Township 7 North, Range 60 East

, in Fallon County, Montana

Name	Division of Interest	P. O. Addresses (GIVE BOX NO. OR STREET ADDRESS
Mrs. Mary Lucy Schuldt	.0625000 RI	
Marcia Knox Orrock	.0625000 RI	

"EXHIBIT I" - 211 -

Winston L. Cox	.0150000	ORI
C. J. Zook	.0075000	ORI
Jacob Van De Linde	.0025000	ORI
Alice L. Eide	.0050000	ORI
Continental Oil Company	.4225000	WI
Vernon M. Eide	.0528125	OWI
Jacob Van De Linde	.0528125	OWI
Gene Huntley	.1584375	OWI
Donald C. Iverson, Trustee	.0792187	OWI
Alvin Larson, Trustee	.0792188	OWI

Until further written notice, you are authorized to receive all oil produced from the above described land and to either purchase for your own account all oil belonging to the undersigned according to the division of interest above indicated or sell and deliver such

oil to the same party or parties to whom you sell your interest in the oil from said land, upon the same terms and conditions, and to receive payment therefor. Whether the oil be purchased by you or by another, the following terms and conditions shall apply and govern the settlement with the undersigned.

[Material deleted]

7. This division order shall become valid and binding upon each of the above listed parties as soon assigned by him, her or it regardless of whether or not any of the other above named parties shall have so signed, and shall be binding upon the undersigned, their assigns and successor in interest.

WITNESSES:

OWNERS
s\ Gene Huntley

SHELL OIL COMPANY

200 North Dairy Ashford
P. O. Box 576
Houston, Texas 77001

October 22, 1984

Gene Huntley
P. O. Box 667
Baker, MT 59313

Dear Mr. Huntley:

SUBJECT: CONTINENTAL OIL COMPANY
- SCHULDT
NW/4 SECTION 8-7N-60E
(TRACT 86 OF THE PENNEL UNIT)
FALLON COUNTY, MONTANA
KEY CODE: 1-10924-133, 433, 833

FRANK A. GUNNIP, RECEIVER OF MCDONALD & EIDE, INC., GENE HUNTLEY AND ROBERT P. SCHWINN V. CONTINENTAL OIL COMPANY AND SHELL OIL COMPANY
CASE NO. 5003
IN THE DISTRICT COURT OF THE 16TH JUDICIAL DISTRICT IN FALLON COUNTY, MONTANA

RE: SERVICE AGREEMENT DATED 1/1/84

We have been notified that Continental Oil Company has filed a Motion for Summary Judgement in the captioned case rais-

ing an adverse claim to a portion of the working interest which has been credited to you. Their motion places in dispute the ownership of one fourth of the working interest in the north half of the Northwest quarter of Section 8, Township 7 North, Range 60 East.

In accordance with paragraph four of the Divison Order covering this property, which calls for the deferment of payments where title is in dispute, we have now suspended payments for one third of your interest, this being the amount in dispute.

Continental Oil Company attached as Exhibit A to its brief, a certified copy of an instrument captioned "Ratification and Adoption of Assignment" dated May 24,

1962, by which H. W. McDonald conveyed an undivided one-half of the 84.5% working interest in the Schuldt Lease in the N½ of Section 8, Township 7 North, Range 60 East, to Continental Oil Company. This instrument was recorded in the Fallon County records on August 27, 1962, in Book 53 at page 188.

At the time Mr. McDonald executed this conveyance, he owned one-half of the working interest in the Schuldt Lease in the N½NW¼ of Section 8. Continental claims that the above described conveyance to it exhausted all of Mr. McDonald's interest in the N½NW¼.

The working interest owners in this property trace their title to the working interest in the N½NW¼ of Section 8 to the

following three assignments, all of which were executed by Mr. McDonald after he executed the above described conveyance to Continental.

Assignment Dated	Recorded	Assignee	Interest in Section 8 Covered By The Assignment
4/9/64	57-121	Gene Huntley	1/4 in the N½NW¼; ½ in the S½NW¼
3/30/64	57-77	Alvin Larson, Trustee	1/8 in the N½NW¼; ¼ in the S½NW¼
3/30/64	57-75	Donald C. Iverson, Trustee	1/8 in the N½NW¼; ¼ in the S½NW¼

Because he had arguably conveyed a full one-half interest in the lease to Conoco, H. W. McDonald may have had no interest in the N½NW¼ of Section 8 to convey to the assignees under these assignments. Until the legal effect of the Ratification and Adoption of Assignement, execut-

ed by Mr. McDonald to Continental, has been fully determined in the subject lawsuit, we must continue to hold in suspense the proceeds attributable to one-fourth of the working interest in the N½NW¼.

Yours very truly,

s\ Larry Rosenberg

L. P. Rosenberg
Property Analyst
For Shell Western E&P Inc.

LPR:PNN

PAGE 31 AND 32 OF SUPREME COURT "BRIEF OF PLAINTIFFS AND RESPONDENTS IN RESPONSE TO THE 'REPLY BRIEF' FILED BY CONTINENTAL OIL COMPANY UNDER DATE OF OCTOBER 18, 1988, FILED PURSUANT TO COURT ORDER OF NOVEMBER 3, 1988, SC:88-331

- - -

CONTINENTAL'S DEFENSES.

THERE HAS BEEN NO DISREGARD OF THIS COURT'S MANDATE.

The first and, we assume, main argument of Continental is that because of this court's ruling the last time it had this case before it the McDonald assignees have no rights at all unless they can prove adverse possession, waiver or estoppel. They didn't prove any of these matters Continental argues and thus must lose its appeal and this case. (Continental's brief pp. 3-7, 38-39).

Continental says this court so limited the rights of the McDonald assignees when they were not before this court, their property rights had not been placed in issue in any court, they had received no hearing and had not been given an opportunity for hearing with respect to Continental's claims against them.

It is fundamental that before a party may be deprived of any rights at all he is entitled to a notice of hearing and hearing before a tribunal having jurisdiction over him and his property. See 16 Am.Jur.2d, Constitutional Law, §839 and various applicable United State and Montana Constitutional provisions and cases construing them.

We do not read the court's decision the last time it had this case before it as restricting in any way the rights of

the McDonald assignees to fully defend the claims of Continental and fully advance their own claims. If the decision does read that way we assume it was inadvertent.

Finally, we showed to the lower court and it found, and we have shown here, that Continental is barred from asserting its claims versus the McDonald assignees by reason of the doctrine of estoppel.

STATEMENT FROM GUNNIP'S BRIEF

"Continental's argument is that it is entitled to one-half of the income from the North half of the North West quarter (one-quarter of the income from the entire North West quarter) because H.W. McDonald conveyed all of his one-half interest in that parcel to it. This is a very doubtful claim but, assuming for purpose of argument that it is true, the claim is entirely irrelevant to this case. Gunnip and Continental are in agreement that McDonald got a one-half interest in the North half of the North West quarter (½N½NW¼) and M & E reserved the other one-half interest. What McDonald did with his interest is entirely irrelevant to these pro-

ceedings. How he managed his property can have no bearing on Gunnip's title or on this case.

There is no proof and no suggestion that M & E or its successor, Gunnip, at any time or in any way joined in, ratified, or approved the conveyance of McDonald upon which Continental relies.

H.W. McDonald never was in a position to and never attempted to make any conveyance of M & E's retained interest. That he couldn't affect Gunnip's reserved title is so obvious that citation of authority is not required.

Continental claims that the assignment made by McDonald entitles it to a 50% interest in the North half of the North West quarter even

though it had treated the conveyance from the time it was made until after the filing of this lawsuit as conveying not a 50% interest in the North half of the North West quarter but 50% of McDonald's interest or a 25% interest. This claim, whatever its merits, has no place in this litigation. It is a matter for Continental and McDonald's successors to work out."[1]

---

[1] This statement from Gunnip's brief was reproduced as "Exhibit D" in Continental Oil Company's "Brief in Support of its Motions to Dismiss and for Attorneys' Fees" filed in the Montana Federal District Court. It was part of petitioners' presentation to the Court of Appeals.

GENE HUNTLEY
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Attorney for Plaintiffs

FILED
APR 18 1989
LOU ALEKSICH, JR., Clerk
By s\ Jennie Huston
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ELKS NATIONAL FOUNDATION, a legal entity; et al.	CV 89-62 BLG-JFB
Plaintiffs,	
- VS -	COMPLAINT
The Honorable FRED J. WEBER, et al.,	
Defendants	

Plaintiffs complain of defendants and allege:

I

This action is brought pursuant to

Title 28, U.S. Code, Section 2201 and 2202 and Title 42, U.S. Code, Section 1983. This court has jurisdiction under Title 28, U.S. Code, Section 1343.

II

This is a civil action brought for preliminary and permanent injunctions, against the named justices and judges, to prevent deprivation, under color of state law, of certain rights, privileges, and immunities secured to plaintiffs by the constitution of the United States, for an order declaring unconstitutional the acts of defendants and, against defendants, Shell Oil Company and Continental Oil Company, for money damages, both compensatory and punitive, to redress the injury caused to plaintiffs by the unconstitutional act of defendants and for attorney's fees and costs.

III

The basis of this action is that plaintiffs were deprived of their property without a hearing and without, therefore, due process of law as secured to them by the Fifth and Fourteenth Amendments to the Constitution of the United States.

IV

The property which was taken from plaintiffs without due process of law is a 1/8th interest in a producing oil and gas lease on the NW¼ Section 8, Township 7N, Range 60E in Fallon County, Montana. (App. pp. 51-53).

V

The oil and gas lease on the NW¼, aforesaid, is owned by the parties to this action, excepting the judges and justices. All parties are resident citi-

zens of the United States of America.

VI

Defendants, Continental Oil Company and Shell Oil Company, are corporations authorized to do business in the State of Montana.

VII

Defendant, Frank Gunnip, is the liquidating trustee of McDonald & Eide, Inc., a Delaware corporation, and defendant, Robert Schwinn, is one of his assignees.

Plaintiffs acknowledge that Frank Gunnip and his assignees, Robert Schwinn and Gene Huntley, are the owners of a one-fourth interest (as they claim) in the oil and gas lease referred to herein, as confirmed to them by decisions of the Montana Supreme Court in proceedings numbered 88-321, 727 P.2d 1315, dated

Sept. 9, 1986 (App. 104-117) and number 88-331 dated Jan. 25, 1989, _____ P.2d ____ (App. 119-125). Frank Gunnip and Robert Schwinn are joined in this matter as nominal or formal parties so that the entire ownership of the lease may be before the court and in the event their presence may later be necessary for full resolution of all disputes. No damages, fees or costs are claimed against them.

VIII

Defendant justices of the Montana Supreme Court are the justices of that court who, through that court, denied plaintiffs due process of law as more fully set forth hereinafter. No damages, fees or costs are claimed against them.

IX

Defendant judges are the judges of the Sixteenth District Court, Fallon

County, Montana, the court which is obliged to follow the opinion of the Supreme Court justices denying plaintiffs due process of law as more fully set forth hereinafter. No damages, fees or costs are claimed against them.

X

Plaintiffs are the successors of Mr. H. W. McDonald to his ownership of a 3/8ths interest in the lease referred to herein.

XI

Annexed to this complaint and incorporated by reference into it is an appendix pages 1 through 127. Part of the appendix consists of a "Third Amended Complaint" filed in the Sixteenth District Court, Fallon County, Montana on behalf of plaintiffs. A table correlating the exhibits in the "Third Amended

Complaint" to the exhibits introduced into evidence and referred to by the State District Court in its "Partial Summary Judgement" is found at page 9 of the appendix.

XII

July 12, 1955 McDonald & Eide, Inc., a Delaware corporation, was the owner of an oil and gas lease on the N½ of Section 8, Township 7N, Range 60E M.P.M. (App. 51-53). On that date, July 12, 1955, McDonald & Eide, Inc., conveyed the S½NW¼ and an undivided one-half interest in the N½NW¼ to H. W. McDonald (App. pp.54-55). After delivery of the deed to Mr. McDonald he owned a three-fourths interest in the NW¼ and McDonald & Eide, Inc. owned a one-quarter interest therein (App. p. 14).

XIII

On May 24, 1962 H.W. McDonald assigned an undivided one-half of his ownership in the lease to defendant, Continental Oil Company (App. pp. 92-93). After the assignment Mr. McDonald owned a three-eighths interest in the lease and Continental Oil Company owned a three-eighths interest in the lease. Mr. McDonald and his successors in interest (plaintiffs) were made periodic payments (generally monthly) on the oil income from the lease from 1964 until 1984 on the basis that they were the owners of a three-eighths interest in said oil and gas lease (App. pp. 15-16, 18).

XIV

On September 9, 1986 in a case entitled Frank A. Gunnip, Receiver of McDonald & Eide, Inc., a corporation, Gene Huntley and Robert P. Schwinn, plaintiffs

and appellants, vs. Continental Oil Company, a corporation, and Shell Oil Company, a corporation, defendants and respondents (Gunnip), the Supreme Court of the State of Montana (S.C. #88-321, 727 P.2d 1315) (App. pp. 104-117) issued an opinion containing the following language:

> "Continental asserts it is entitled to a 50% interest in the N½ of the NW¼ of the Lease under the ratification agreement with McDonald. However, Continental admits in its brief that it did not adopt this position at the time the ratification agreement was executed in 1964; prior to the time judgment no. 4062 was entered, Continental derived a 25% interest in the N½ of the NW¼ from the Eide and Von DeLinde conveyance and 25% interest under the

ratification agreement. Judgment no. 4062 voided the conveyance from M & E to Eide and Von DeLinde in its entirety, thereby eliminating the 25% interest Continental claimed under assignment from Eide and Von DeLinde. Following judgment no. 4062, Continental continued to assert a 50% interest under the ratification agreement with McDonald.

There remain unresolved issues of material fact regarding the interest of Continental. Although McDonald conveyed an 'undivided one-half interest' in the Lease under the ratification agreement, Continental admits in its brief that it did not treat its 50% interest in the N½ of the NW¼ as being derived solely from McDonald until judgment

no. 4062 was entered. In 1964 McDonald assigned undivided interests to Huntley, Iverson, and Larson. Huntley, Iverson and Larson have claimed under this assignment adverse to the interest Continental now claims under the ratification agreement. A trial must be held to assess Continental's interest considering potential application of adverse possession, waiver and estoppel."

XV

Insofar as the Montana Supreme Court opinion (supra) served in any way to limit the title, right or claims of plaintiffs herein it was, and is, entirely void. The rights of plaintiffs, as the assignees of Mr. McDonald's interests, had not been litigated, tried, tested or

even put in issue in Gunnip, or any other litigation, by Continental Oil Company or any other entity at the time of the issuance of the opinion of Sept. 9, 1986. Also none of the plaintiffs were parties to the Gunnip litigation except Gene Huntley and he was in that litigation as an assignee of Gunnip, not Mr. H. W. McDonald.

XVI

Following the rendition by the Montana Supreme Court of its opinion in Gunnip on September 9, 1986, and pursuant to its requirements that they be joined as parties, the plaintiffs on October 6, 1987 (App. 5) as assignees of Mr. McDonald, joined as parties to the litigation, (renamed after remand as "Elks, et al vs. Continental, et al,") and sued defendants Continental Oil Company and Shell Oil

Company for damages both compensatory and punitive, for bad faith and breach of fiduciary relation, for an accounting, and, on the basis of repudiation, (refusal to pay a full 3/8ths share of proceeds from 1984 to present) that the Mcdonald assignment to Continental be canceled (App. 29-100).

XVII

After the joinder of plaintiffs in the litigation and the renaming of it to Elks, et al, v. Continental, et al, the case came on for hearing before the Sixteenth District Court of Fallon County, Montana on the application of plaintiffs (and of Gunnip) for summary judgment. As the rights and titles of the parties appeared by uncontradicted evidence the said Sixteenth District Court of Fallon county, Montana granted summary judgment

to plaintiffs adjudging them the owners of three-eights interest in the lease in question, defendant Continental Oil Company to be the owner of a three-eights interest and Gunnip and his assignees to be the owners of a one-quarter interest. The court reserved all other claims of the parties as to damages, forfeiture and attorneys' fees for later hearing. (App. pp. 10-28).

XVIII

Following the entry of the aforesaid district court summary judgment and on application of defendant, Continental Oil Company, the defendant justices, through the Montana Supreme Court, issued a Writ of Supervisory Control and on January 25, 1989 issued a final judgment ruling:

1. That the language used by the parties "undivided one-half interest"

meant an undivided one-half interest in the entire lease, not an undivided one-half of what Mr. McDonald owned in the lease.

2. That the only claims of plaintiffs which the lower court should have considered on remand were adverse possession, waiver and estoppel.

3. That the lower court committed reversible error in considering the title claims of plaintiffs with respect to matters other than adverse possession, waiver and estoppel.

4. That plaintiffs had not made a satisfactory showing of adverse possession, waiver or estoppel, and, therefore,

5. The judgment of the lower court was reversed, and,

6. Title was decreed to be one-half in Continental, one-quarter in

plaintiffs and one-quarter in Gunnip and his assignees. (App. pp. 118-125).

XIX

With respect to the justices ruling (supra) that the meaning of the words "undivided one-half interest" meant a one-half interest in the lease rather than one-half of Mr. McDonald's ownership, that determination was entirely arbitrary; made without granting plaintiffs a hearing or trial with respect to how that language should be construed.

With respect to the defendant justices' statement that the only matters which the lower court should have considered were adverse possession, waiver and estoppel, plaintiffs do not know where these claims were contrived. Plaintiffs do not and have not relied upon the doctrines of adverse possession or waiver

and rely upon estoppel only collaterally to one of their primary claims. Plaintiffs' claims to title are based, primarily, on a construction of the Mcdonald assignment according to the usual rules of construction and agreements made after the assignment by defendant Continental Oil company and the McDonald assignees. These claims of plaintiffs are set forth in their complaint (App. pp. 29-100) and were, after full consideration of them, adopted by the district court. (App. 10-28).

XX

The assignment to plaintiffs by defendant justices of the claims of adverse possession, waiver and estoppel was done by whim and the refusal of the defendant justices to consider the title claims of plaintiffs was a denial of due

process of law.

XXI

Plaintiffs brought to the attention of defendant justices of the Montana Supreme Court, in brief and petition for rehearing, that they could not constitutionally take plaintiffs' property from them and give it to Continental Oil Company, as it demanded, without a hearing. (App. pps. 126-127).

XXII

The defendant justices of the Montana Supreme Court, under color of State law, took away the property of plaintiffs without a hearing in violation of the rights which they, as citizens, have under the Fifth and fourteenth Amendments to the United States Constitution.

XXIII

By reason of the premises plaintiffs

have no plain, speedy or adequate remedy at law.

XXIV

Plaintiffs are entitled to a reasonable attorneys' fee from defendant Continental Oil Company for the prosecution of this proceeding.

WHEREFORE, plaintiffs demand judgment:

(1) Declaring the aforesaid judgment (S.C. #88-331 dated January 25, 1989, ____ P.2d _____) issued by the justices of the Montana Supreme Court, defendants herein, unconstitutional as to plaintiffs as being in violation of due process of law.

(2) Declaring said judgment void as to these plaintiffs.

(3) Issuing preliminary and permanent injunctions restraining defendants

from enforcing or in any way implementing said judgment.

(4) Granting plaintiffs the relief to which they are entitled under the law and their attached pleadings against defendants Continental Oil Company and Shell Oil Company, including the award of title, damages (compensatory and punitive), costs and attorneys' fees.

(5) Granting plaintiffs attorneys' fees, costs and such other and further relief as may be just.

Dated this 4th day of April, 1989.

GENE HUNTLEY, P.C.
Office and Post Office Address
P. O. Box 760
Baker, Montana 59313

By s\ Gene Huntley
Attorney for Plaintiffs

No. 91-1745 (3)

Supreme Court, U.S.
FILED
MAY 26 1992

In The

Supreme Court of the United States

October Term, 1991

ELKS NATIONAL FOUNDATION, A LEGAL ENTITY, *et al.*,

Petitioners,

vs.

FRED J. WEBER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT BRIEF IN OPPOSITION FOR RESPONDENTS CONTINENTAL OIL COMPANY, SHELL OIL COMPANY, GUNNIP AND SCHWINN

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2040
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QUESTIONS PRESENTED

1. Did the district court properly dismiss the McDonald assignees' action for lack of subject matter jurisdiction?

2. Did the district court abuse its discretion in awarding attorney's fees as sanctions under Rule 11 Fed. R. Civ. P.?

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No. 91-1745

In The

Supreme Court of the United States

October Term, 1991

ELKS NATIONAL FOUNDATION, A LEGAL ENTITY, *et al.*,

Petitioners,

vs.

FRED J. WEBER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT BRIEF IN OPPOSITION FOR RESPONDENTS CONTINENTAL OIL COMPANY, SHELL OIL COMPANY, GUNNIP AND SCHWINN

STATEMENT OF THE CASE

Unfortunately, there is no way to present a statement of this case simply or summarily. To understand the petitioners' claim, and why the petition is frivolous, requires a review of the

underlying facts in the Montana state court litigation, including the chain of title to the disputed interest, as well as the procedural history of this case. These matters are not satisfactorily presented in the petition for writ of certiorari.

Most of the chain of title is set out in the Montana Supreme Court decision *Gunnip v. Continental Oil Co.*, 223 Mont. 141, 727 P.2d 1315 (1986) (A58-89). The state court litigation in Montana was over title to the lessee's interest — the so-called "working interest" — in a producing oil and gas lease covering the NW¼ of Section 8, Township 7 North, Range 60 East, Fallon County, Montana. The petitioners are the "McDonald Assignees" referred to in the last three paragraphs of the *Gunnip* decision, 223 Mont. at 144-145, 727 P.2d at 1317 (A68-69).

Before July of 1955, McDonald & Eide, Inc. (MEI) owned the entire working interest in the lease, subject to the 12.5% landowner's royalty reserved by the mineral owner-lessor, and a 3% overriding royalty held by third parties not involved here. These royalties are not in dispute.

By assignment dated July 12, 1955 (A185-189), MEI assigned 50% of the working interest in the N½NW¼ of Section 8, and all of the working interest in the S½NW¼, to H. W. McDonald. This assignment was not recorded — to give constructive notice to subsequent purchasers under Montana's recording statutes — until May 15, 1963.

MEI's corporate charter was repealed in 1958. On June 1, 1961, MEI's officers, Vernon E. Eide and Jacob Von DeLinde, purported to execute an assignment on behalf of MEI conveying all of the working interest in the NW¼ of Section 8 to themselves, Eide and Von DeLinde, as individuals. This assignment was recorded on November 13, 1961, before MEI's assignment to McDonald was recorded.

Shortly thereafter, two things happened. Continental began negotiations with Eide and Von DeLinde to purchase 50% of the working interest in the NW¼. And H. W. McDonald filed a quiet title action against MEI and Eide and Von DeLinde, Civil No. 3679 in the state district court for Fallon County, to confirm his ownership of the interest covered in his unrecorded assignment from MEI.

By assignment dated May 22, 1962 (A190-198), Eide and Von DeLinde purported to convey a one-half interest in the lease to Continental. Two days later, H. W. McDonald executed a Ratification and Adoption of Assignment (A199-203) ratifying the Eide and Von DeLinde assignment to Continental as if he had been one of the assignors. In the ratification, Mr. McDonald also did three other things. He conveyed a half interest in the lease to Continental. He expressly denied that Eide and Von DeLinde had any interest in the lease. And he claimed to be the owner of the lease.

There is a misstatement on p. 7 of the petition, that it cannot be determined from the language in the ratification if Mr. McDonald assigned one-half of what he owned in the lease or a one-half interest in the lease. The ratification clearly conveyed a one-half interest in the lease to Continental, not merely half of what Mr. McDonald owned.

After Eide and Von DeLinde's assignment and McDonald's ratification were recorded on August 27, 1962, Continental proceeded to drill a producing well in the NW¼ of Section 8.

In 1964, while his quiet title action against MEI, Eide and Von DeLinde was still pending, H. W. McDonald executed assignments purporting to convey a 50% interest in the N½NW¼ of Section 8, and 50% of his interest in the S½NW¼, to Gene

Huntley, and an undivided 25% interest in the N½NW¼, and 25% of his interest in the S½NW¼, each, to Donald Iverson and Alvin Larson. These assignments were confusing because McDonald only claimed to own a 50% interest in the N½NW¼ under his assignment from MEI.

Gene Huntley, one of Mr. McDonald's assignees, is also one of the petitioners here, and the attorney for the petitioners. The rest of the petitioners are the other successors to H. W. McDonald, Iverson and Larson. The petitioners own the interest that Mr. McDonald retained after his ratification of the Eide and Von DeLinde assignment to Continental. They have been collectively referred to throughout the Montana and Federal Court litigation as the "McDonald Assignees."

The final judgment in the quiet title action against MEI and Eide and Von DeLinde was entered on June 16, 1964. It quieted Mr. McDonald's title, under his assignment from MEI, to 50% of the working interest in the N½NW¼ of Section 8, and all of the working interest in the S½NW¼, subject to his ratification agreement with Continental. The interests held by Mr. McDonald's assignees — Huntley, Iverson and Larson — were not addressed in the decree.

The petition for writ of certiorari is based on the July 16, 1964 letter by Continental to Mr. Huntley and the resulting division orders (A204-213) that came after the quiet title decree. The letter and division orders are not discussed in *Gunnip v. Continental Oil Co.*, 223 Mont. 141, 727 P.2d 1315 (1986).

Following the quiet title decree, Continental, as the operator of the producing well in the NW¼ of Section 8, was responsible for disbursing the working interest share of production to the owners of the lease. Continental was concerned about Mr. McDonald's assignments to Huntley, Iverson and Larson, because

they were inconsistent with the decree.

Continental contacted Mr. Huntley to see if Mr. McDonald's assignees could agree on what interests they owned. This led to Continental's July 16, 1964 letter to Mr. Huntley (A204-208). The letter sets out what Continental and Huntley mistakenly believed to be the working interest ownership at the time. The 84.5% figure used in the letter refers to the working interest share of production after deducting the 12.5% landowner reoyalty and the 3% overriding royalty (100% - 15.5% = 84.5%). The letter reflects the following working interest ownership in the NW¼ of Section 8:

N½NW¼

Continental —	50%
McDonald Assigness (Huntley, Iverson and Larson) —	25%
Eide and Von DeLinde —	25%
Total —	100%

S½NW¼

Continental —	50%
McDonald Assignees (Huntley, Iverson and Larson) —	50%
Total —	100%

The letter also points out that the NW¼ of Section 8 had been designated as the spacing unit for the producing well. As such, production from the well was shared according to ownership of the entire spacing unit, being all of the NW¼. Based on the ownership set out above, the "pooled" or combined working interest in the spacing unit was thought to be owned 50% by Continental, 37.5% by the McDonald Assignees and 12.5% by Eide and Von DeLinde.

In other words, Continental owned 50% of the working interest in the N½NW¼ and 50% in the S½NW¼, which, of course, is 50% of the entire NW¼. The McDonald assignees were thought to own 25% of the working interest in the N½NW¼ and 50% in the S½NW¼, which would be a combined 37.5% interest in all of the NW¼. The parties believed that Eide and Von DeLinde owned a 25% interest in the N½NW¼ and nothing in the S½NW¼, which would be a 12.5% interest in the NW¼. Division orders (used for disbursing the production proceeds) were executed by the parties based on this supposed ownership effective as of the date of first runs (or production) from the well (A211-213). At the time of the 1964 letter and division orders, the parties were mistaken about the actual ownership of Eide and Von DeLinde and the McDonald Assignees.

MEI's shareholders appointed Frank Gunnip as Receiver for the corporation in 1965. On February 20, 1967, the Receiver brought suit againt MEI and its corporate officers, Civil No. 4062 in the Fallon County District Court, to recover MEI's working interest in the NW¼ of Section 8. On December 21, 1970, the district court ruled that Eide and Von DeLinde had fraudulently obtained the assignment from MEI in 1961, and that the assignment was void. Final judgment was entered on January 7, 1966, decreeing that the Receiver owned 50% of the working interest in the N½NW¼ of Section 8 — that is, all of the working interest that MEI had not assigned to H. W. McDonald.

Shell Oil Company succeeded Continental as operator of the producing well in the NW¼ of Section 8. After Civil No. 4062, Continental continued to claim 50% of the working interest in the NW¼ under McDonald's ratification. Shell continued to pay Continental on that basis.

In 1981, the Receiver assigned a 3.75% interest in the N½NW¼ of Section 8 to Gene Huntly (also one of Mr. McDonald's assignees) and a 2.5% interest in the N½NW¼ to Robert Schwinn.

Shortly thereafter, Mr. Huntley became aware that Shell was only paying the Receiver and his assigns for 12.5% of the working interest production from the well in the NW¼ of Section 8 (based on a 25% interest in the N½NW¼), instead of 25% of the working interest production (based on a 50% interest in the N½NW¼). The Receiver and his assigns, represented by attorney Huntley, brought an action against Continental and Shell Oil in the state district court, Civil No. 5003, demanding an additional 12.5% of the working interest production over what they had received. They claimed that Shell had overpaid Continental the 12.5% working interest production that should have been paid to them.

The McDonald assignees were not named as parties in the suit. Shell moved to have them joined but its motion was denied.

Continental defended against the Receiver's action arguing that it did own a 50% working interest in the NW¼, because H. W. McDonald owned sufficient interests, at the time of his ratification, to convey the 50% interest that Continental claimed and had been paid for. Continental argued that if anyone had been overpaid it was the McDonald assignees, because the ratification exhausted Mr. McDonald's ownership in the N½NW¼, meaning that the McDonald assignees had no interest

in these lands, though they had been paid based on their claim to a 25% interest in the N½NW¼. As such, they were the ones that had been overpaid the 12.5% of the working interest production from the spacing unit well that should have gone to the Receiver and his assigns.

In 1985, the state district court granted summary judgment to Continental, confirming its 50% working interest in all of the NW¼ of Section 8. However, the Montana Supreme Court in *Gunnip v. Continental Oil Company,* 223 Mont. 141, 727 P.2d 1315 (1986) (A58), reversed and remanded, saying:

> The court cannot decide Continental's interest under McDonald's ratification agreement without McDonald's assignees before the court. They must be joined on remand.
>
> Continental's asserted 50% interest in the N½ of the lease [meaning the N½NW¼ of Section 8] must be tested against the interest of McDonald's assignees and their successors in interest. The order of the District Court awarding summary judgment to Continental is reversed. The matter is remanded for further proceedings in accordance with this opinion.

Gunnip v. Continental Oil Co., 223 Mont. at 144, 727 P.2d at 1317 (A69).

On remand to the state district court, the McDonald assignees were joined as plaintiffs. The Receiver and Schwinn obtained separate counsel and were redesignated as defendants. The McDonald assignees argued that it was not clear from the ratification whether Mr. McDonald intended to convey a half interest in the lease or only half of his interest. They relied on

the July 16, 1964 letter and the resulting division orders as evidence that the ratification should be interpreted as conveying only half of Mr. McDonald's ownership, because the letter and division orders showed the McDonald assignees as owning half of the interest covered by the MEI assignment to Mr. McDonald.

Continental argued that the ratification clearly conveyed "an undivided one-half interest" in the lease as a matter of law, and the mistaken letter and division orders did not affect Continental's title to this interest.

On April 29, 1988, the district court granted partial summary judgment to the McDonald assignees (A92-122), holding that the ratification only transferred half of Mr. McDonald's interest in the lease. The court's judgment was based largely on the 1964 letter and division orders.

Continental applied to the Montana Supreme Court for a writ of supervisory control. In doing so, Continental pointed out that the earlier *Gunnip* decision gave no indication that the ratification was ambiguous, and had even recognized that the ratification conveyed "an undivided one-half interest" in the lease.

The McDonald assignees responded (A219-221) saying that they were not before the court when *Gunnip* was decided, so they were free to assert a different interpretation of the ratification, a different theory of ownership, based on the 1964 letter and division orders. They have taken the same position on p. 13 of their petition.

The McDonald assignees briefed the issued concerning the interest conveyed by the ratification, and the effect of the 1964 letter and division orders, argued them orally to the Montana Supreme Court, and even supported Continental's request that the court decide Continental's ownership once and for all. In

Continental Oil v. Elks Nat'l Foundation, 235 Mont. 438, 767 P.2d 1324 (1989) (A123-135), the Supreme Court reversed the district court, holding that the ratification conveyed a 50% interest in the lease to Continental, that Continental had not relinquished this interest, and that the Receiver and his assigns owned the other 50% interest in the N½NW¼.

The result of the court's ruling is that Continental was right. The combined working interest in the NW¼ of Section 8 is owned 50% by Continental, 25% by the Receiver and his assigns, and 25% by the McDonald assignees. The Receiver and his assigns have been underpaid by 12.5% of the working interest production. This 12.5% share that should have gone to the Receiver and his assigns, was mistakenly paid to the McDonald assignees. The McDonald assignees received 37.5% of the working interest production, based on their claim to a 25% interest in the N½NW¼ plus a 50% interest in the S½NW¼. Under the Montana Supreme Court's ruling, however, they have no interest in the N½NW¼, meaning they have been overpaid for 12.5% of the working interesst production. Mr. Huntley has been overpaid as one of the McDonald assignees, and underpaid as one of the Receiver's assigns.

After the Montana Supreme Court's decision in *Continental Oil v. Elks Nat'l Foundation,* the McDonald assignees did not petition for writ of certiorari to the United States Supreme Court under 28 U.S.C. § 1257. It is not clear why the petitioners have cited this statute on pp. 4-5 of their petition, since they have not invoked it here. Instead, by complaint dated April 4, 1989 (A225-244), they brought an action under 42 U.S.C. § 1983 (Pet. 3-4) in the United States District Court against the Montana Supreme Court justices, the two state district court judges, Continental, Shell Oil, Gunnip and Schwinn. They alleged that the Montana Court denied them due process by depriving them of their property rights without a hearing. More specifically, they

claimed that the Montana court did not give them a hearing on how the ratification should be construed or the effect of the 1964 letter and division orders.

Their claim is that the Montana court in the *Continental* decision held them to its prior ruling in *Gunnip* (where they were not parties) as to the interest conveyed by the ratifiction, and refused to hear or consider their arguments and evidence of title based on the 1964 letter and division orders.

On November 17, 1989, the district court issued its memorandum and order (A33-46) dismissing the McDonald assignees' complaint for lack of subject matter jurisdiction, based primarily on 28 U.S.C. § 1257(a) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

The district court also found that the McDonald assignees' complaint was not well grounded in law, and awarded attorney's fees to the defendants under 42 U.S.C. § 1988, or alternatively as sanctions under Rule 11, Fed. R. Civ. P. (A43-45). The McDonald assignees did not challenge the reasonableness of the attorney's fees awarded (A29).

The McDonald assignees then appealed to the United States Court of Appeals for the Ninth Circuit. They relied solely on *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986), in attempting to find grounds for subject matter jurisdiction in the federal district court.

In *Elks Nat'l Foundation v. Weber*, 942 F.2d 1480 (9th Cir. 1991) (A1-16), the court of appeals affirmed the district court in dismissing the McDonald assignees' complaint for lack of subject matter jurisdiction, and the award of attorney's fees. The appeals court also awarded attorney's fees on appeal.

Like the district court, the court of appeals relied on 28 U.S.C. § 1257(a) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983) holding that "[t]he Supreme Court of the United States is the only federal court authorized to hear appeals from state courts." *Elks Nat'l*, 942 F.2d at 1483 (A10).

SUMMARY OF ARGUMENT

The district court properly dismmissed the McDonald assignees' complaint for lack of subject matter jurisdiction. Their § 1983 action, like their petition here, is essentially an attempt to continue the state court litigation in Montana, to have the Montana Supreme Court's ruling on ownership reviewed by the federal courts. However, the United States district courts are courts of original jurisdiction. They cannnot hear appeals from a state supreme court. The Supreme Court of the United States is the only federal court authorized to hear appeals from state courts, and the McDonald assignees did not appeal the Montana Court's decision to the United States Supreme Court.

More importantly, the Montana Supreme Court did not deny the McDonald assignees due process or deprive them of their property rights without a hearing. The Montana Court heard, considered and even discussed the issues raised and arguments presented by the McDonald assignees, before deciding the ownership question.

The complaint filed by the McDonald assignees in the District Court was not well grounded in fact, nor warranted by existing law, or any good faith argument. It was baseless, frivolous and unreasonable. The District Court's award of sanctions under Rule 11, Fed. R. Civ. P. was not an abuse of discretion.

The McDonald assignees' petition for writ of certiorari is

equally as frivolous as their complaint in the district court. The respondents should be awarded just damages and single or double costs.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT PROPERLY DETERMINED THAT IT LACKED SUBJECT MATTER JURISDICTION.

The district court correctly dismissed the McDonald assignees' complaint for lack of subject matter jurisdiction. The United States district courts are courts of original jurisdiction. They cannot hear appeals from a state supreme court. The Supreme Court of the United States is the only federal court authorized under 28 U.S.C. § 1257(a) to hear appeals from state courts. This statute provides in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the . . . statutes of . . . the United States.

Furthermore, *District Court of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983) holds that:

> [The United States district courts] do not have jurisdiction . . . over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review

of those decisions may be had only in this Court.

In addition, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) is also authority for this principle that a United States district court does not have power to review a judgment by the highest court of a state on the ground that the judgment is in conflict with the United States Constitution.

The case law applying this rule is voluminous. It would serve no useful purpose to cite the many cases that have followed the "*Rooker-Feldman* principle." Accordingly, only a fraction of these cases are listed below. *Atlantic Coast Line R. Co. v. Engineers,* 293 U.S. 21, 286 (1970); *Allah v. Superior Court of State of Cal.*, 871 F.2d 887 (9th Cir. 1989); *Anderson v. Lecon Properties, Inc.*, 457 F.2d 929, 930 (8th Cir. 1972); *Van Sicle v. Holloway,* 791 F.2d 1431, 1436 (10th Cir. 1986); *Hollins v. Wessel,* 819 F.2d 1073, 1074 (11th Cir. 1987); *Martinez Rivera v. Trias Monge,* 587 F.2d 539, 541 (1st Cir. 1978); *Reynolds v. State of Georgia,* 640 F.2d 702, 705 (5th Cir. 1981); *Hale v. Harney,* 786 F.2d 688, 690-691 (5th Cir. 1986).

II.

THE CLAIMS BY THE MCDONALD ASSIGNEES ARE BARRED BY *RES JUDICATA.*

Res judicata means "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Kramer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982). The reasons for the doctrines of *res judicata* and collateral estoppel are to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudicaition." *Allen v. McCurry,* 449 U.S. 90, 94 (1980).

The full faith in credit statute in 28 U.S.C. § 1738 provides in relevant part that "[t]he records and judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . as they have by law or usage in the courts of such State . . . from which are taken." It is well settled that under this statute the federal courts must give state court judgments the same preclusive effect they would be given under the law of that state. *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 81 (1984).

The subject matter and issues in the action brought by the McDonald assignees in the United States district court are precisely the same as in the Montana litigation. The main issue in both is the ownership of the working interest in the NW¼ of Section 8. However, the Montana Supreme Court has already decided this ownership question, and its decision is conclusive on the lower federal courts.

In arguing that the district court has subject matter jurisdiction, the McDonald assignees rely on *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986) commencing at p. 34 of their petition. Oddly enough, on pp. 54-64 of the petition, they even quote from one of the briefs to this Court in the *Robinson* case. However, the *Robinson v. Ariyoshi* decision is primarily important concerning the doctrine of *res judicata*, not subject matter jurisdiction.

The court of appeals considered the McDonald assignees' argument based on *Robinson v. Ariyoshi*. It found that "[t]heir reliance on that case is both misplaced and ill-advised." *Elks Nat'l*, 942 F.2d at 1483 (A10). Since the *Robinson* case was also decided by the Courts of Appeals for the Ninth Circuit, naturally the appellate court's analysis of the case has special insight. The court said that in *Robinson* it "analyzed the bar to federal court

jurisdiction under *Feldman* as essentially calling for a *res judicata* analysis on whether an issue had been considered and decided in the state courts." But where a state court has considered and decided the question presented, an action in federal court concerning the same issue is an impermissible appeal from the state court dicision. *Elks Nat'l,* 949 F.2d at 1484 (A11).

The appeals court also found that the Montana Supreme court did hear and decide the questions presented by the McDonald assignees, and that they had clearly been "given an opportunity to litigate the issue and that the Montana Supreme Court considered those arguments." *Elks Nat'l,* 949 F.2d at 1484 (A12). The court said that:

> Thus, the McDonald Assignees' reliance on *Robinson* [*v. Ariyoshi*] is ill-advised because any res judicata analysis, no matter how myopic, will readily disclose that the Montana courts have decided and re-decided the issue of the quality and quantity of [their] interests in the lease, and that the McDonald Assignees were afforded a full and fair opportunity to be heard."

Elks Nat'l, 942 F.2d at 1484 (A12).

The appeals court also pointed out that the facts in *Robinson v. Ariyoshi* "are distinguishable from the facts of this case," saying:

> The state court [in *Robinson*] issued a decision which allegedly overturned the existing state water rights system. It was the imposition of a new substantive rule that gave rise to claims of a taking without due process in *Robinson [v. Ariyoshi].* The relief granted by the federal district court which

> was the subject of the appeal in *Robinson [v. Ariyoshi]* was an injunction against applying the new law announced [by the state court]. In *Continental Oil* and *Gunnip*, the state court applied well-polished rules of Montana law that unambiguous written instruments do not need interpretation. In this case, there is no new substantive rule of Montana law at issue which could take property without due process if applied in other cases. It is only the specific result in *Continental Oil* which the McDonald assignees have challenged in federal court. If McDonald's assignees were entitled to pursue their claim in federal court, every disappointed litigant in a property dispute would contend in federal court that the state court decision constituted a taking without due process. *Robinson [v. Ariyoshi]* provides appellants no method for obtaining federal jurisdiction over their claim. McDonald's assignees' sole avenue for redress in the federal system was a petition for writ of certiorari to the Supreme Court of the United States.

Elks Nat'l, 942 F.2d at 1485 (A13).

III.

THE MCDONALD ASSIGNEES HAVE NOT BEEN DEPRIVED OF DUE PROCESS.

The McDonald assignees alleged in their complaint that the Montana Supreme Court deprived them of due process in *Continental Oil v. Elks Nat'l Foundation*, 235 Mont. 438, 767 P.2d 1324 (1989) (A123) by holding them to its prior ruling in *Gunnip v. Continental Oil Co.*, 223 Mont. 141, 727 P.2d 1315

(1986) (A58), as to the interest conveyed to Continental by H. W. McDonald's ratification. They complained that they were not parties when *Gunnip* was decided, and that the Montana Court in *Continental* refused to hear or consider their arguments and evidence of title based on the 1964 letter and division orders.

The McDonald assignees have taken this same position on p. 18 of their petition for writ of certiorari ("The Montana Supreme Court, in its [*Continental*] opinion, considered the parties, the lower court, and itself bound by the language of the previous decision [in *Gunnip*]."), and on p. 30 ("the Court of Appeals like the Montana Supreme Court, completely disregarded this important document [the July 16, 1964 letter]. * * * we did not complain about procedure but about the Montana Supreme Court's refusal to consider our evidence ot title based upon a binding contract of at least equal dignity with the assignment upon which Continental relies [referring to the 1964 letter and resulting division orders]."), and on p. 32 ("The contract upon which we rely [the 1964 letter and division orders] . . . was a separate contract . . ., wholly independent of the McDonald assignment and of equal legal dignity. This circumstance, which was brought home fully to both the Montana Supreme Court and the Ninth Circuit Court of Appeals was totally ignored by both courts."). They are absolutely wrong.

In *Continental Oil v. Elks National Foundation*, 235 Mont. 438, 440-442, 767 P.2d 1324, 1326-1327 (1989) (A130-134), the Montana Supreme Court said this:

> The [McDonald assignees] argue here, as they did before the District Court, that the ratification is ambiguous so that a court must look beyond the four corners of the document to interpret it. The Court was not persuaded by that argument in *Gunnip*, nor is it now.

* * *

Then, as now, we found no ambiguity in the ratification agreement.

* * *

We have considered all materials and evidence submitted by plaintiffs [the McDonald assignees], including copies of certain oil division orders and correspondence between Continental and plaintiffs' attorney [Gene Huntley]. We have considered whether those might support a theory of adverse possession, waiver, or estoppel against Continental. However, we find nothing to indicate that Continental has relinquished its claim to any portion of one-half of the working interest in the N½NW¼. The documents reflect Continental's mistaken reliance, at that time, on the validity of interests claimed by Vernon Eide and J. Von DeLinde. This ended after the 1970 judgment voiding the conveyance to Mr. Eide and Mr. Von DeLinde and vesting ownerhsip in Gunnip [citation omitted]. Plaintiffs contend that the documents demonstrate that Continental relied upon a conveyance to it from Mr. Eide and Mr. Von DeLinde. We do not accept that contention. The mere statement in the letters and division order of a supposed interest held by Eide and Von DeLinde is not enough to establish a loss of the interest conveyed to continental from H. W. McDonald. The documents also indicate that Mr. Huntley and two other McDonald assigns held interest in the lease. They do not name the grantor of any of the interests, however. The documents

> uniformly show Continental's claim to one-half of the working interest. We conclude that the plaintiffs have failed to present substantial evidence to support a theory of adverse possession, waiver, or estoppel against Continental.

The court of appeals also referred to this language in *Elks Nat'l Foundation v. Weber*, 942 F.2d at 1482 (A8).

There is no indication in the *Continental* decision that the Montana Supreme Court refused to hear or consider the arguments presented by the McDonald assignees on how the ratification should be interpreted, or the effect of the 1964 letter and division orders. The opposite is true. The Montana court expressly considered and discussed their arguments, but was not persuaded. On pp. 19, 30, 31, 32 and 65 of their petition, the McDonald assignees argue that the Montana Supreme Court and the court of appeals refused to consider their ownership claims based on the 1964 letter and division orders. Contrary to these misstatements, the Montana Court did consider the 1964 letter and division orders, and the arguments based on them that the McDonald assignees presented.

Due process does not require a court to be convinced by what it hears. That is true even if the court is wrong. The Fourteenth Amendment's due process guarantee does not ensure against judicial error. *Stein v. People of State of New York*, 346 U.S. 156, 181 (1953) ("Mr. Justice Brandeis, for this Court, long ago warned that the Fourteenth Amendment does not, in guaranteeing due process, assure immunity from judicial error. *Milwaukee Electric Railway & Light Co. v. State of Wisconsin ex rel. City of Milwaukee*, 252 U.S. 100, 106 . . . ."). The contention that a state court decision is erroneous does not present a federal question. *Bell Telephone Co. v. Pennsylvania Public U. Com'n.*, 309 U.S. 30, 32 (1940). A state cannot be deemed guilty of violating

the constitutional provision against deprivations "without due process of law" because of a decision, even if it is erroneous, of its highest court while acting within its jurisdiction. *Ex Parte Converse*, 137 U.S. 624 (1891). Even errors of a state court in interpreting and applying the laws of the state does not establish any denial of due process. *Howard v. Kentucky*, 200 U.S. 164 (1906).

However, in this particular case the Montana Supreme Court's ownership ruling in *Continental* was not wrong. There are clear and cogent reasons why the Montana Court was unconvinced by the McDonald assignees's arguments. It has long been well established in Montana that if the language of a deed (like the ratification) is clear on its face, its provisions control the court's interpretation of the interest conveyed. Moreover, it is a question of law whether a deed is clear on its face. The intent of the parties is only considered when a deed is unambiguous. *See Morning Star Enterprises v. R. H. Grover*, 247 Mont. 105, 111, 805 P.2d 553, 556 (1991). H. W. McDonald's ratification conveyed "an undivided one-half interest" in the lease to Continental. The Montana Supreme Court ruled that Continental still owns this interest. It is as simple as that.

"The fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.' " *Parratt v. Taylor*, 451 U.S. 527, 540 (1981) [quoting from *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)], *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). The Montana Supreme Court heard and considered and discussed the issues raised by the McDonald assignees before deciding the working interest ownership of the lease. Indeed, it was the Montana court that required the McDonald assignees to be joined in the action so that they could be heard on the ownership question.

IV.

THE FEDERAL DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING SANCTIONS AGAINST THE MCDONALD ASSIGNEES.

On pp. 66-67 of the petition, the McDonald assignees argue that the district court's award of attorney's fees should be reversed. The district court awarded attorney's fees against the McDonald assignees based alternatively on 42 U.S.C. § 1988 or as sanctions under Rule 11, Fed. R. Civ. P.

> It is now clear that the central purpose of Rule 11 is to deter baseless filings in the District Court . . . . [Citation omitted.] Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well-grounded in fact, legally tenable, and "not interposed for any improper purpose." * * * [A]ny interpretation [of Rule 11] must give effect to the rule's central goal of deterrence.

Cooter & Gel v. Hartmarx Corp., 496 U.S. ____, ____, 110 L. Ed. 2d 359, 374, 110 S. Ct. 2447, ____ (1990). *Cooter & Gel*, 496 U.S. at ____, 110 L. Ed. 2d at 384, 110 S. Ct. at ____, also "hold[s] that an appellate court should review the district court's decision in a Rule 11 proceeding for an abuse of discretion."

Given what the Montana Supreme Court said in *Continental Oil v. Elks Nat'l Foundation*, the McDonald assignees' complaint in the district court was not well grounded in fact nor warranted by existing law or any good faith argument. It was baseless, frivolous and unreasonable. Rule 11 sanctions were proper. The district court's award was not based on an erroneous view of the

law. The district court did not have subject matter jurisdiction over the case brought by the McDonald assignees seeking appellate review of the Montana Supreme Court's ruling on ownership. Furthermore, the McDonald assignees did not contest the reasonableness of the fees awarded by the district court as sanctions.

After considering the McDonald assignees' complaint and their argument on subject matter jurisdiction, the court of appeals held that it was "clear that the district court did not abuse its discretion in awarding attorney's fees to appellees." *Elks Nat'l*, 942 F.2d at 1485 (A14).

However, before awarding attorney's fees on appeal under 42 U.S.C. § 1988, the court went on to examine the merits of the McDonald assignees' claim that they were denied due process by the Montana Supreme Court. The appeals court correctly found that:

> The proceedings before the Montana Supreme Court do not support this contention. The McDonald assignees briefed the ambiguity issue, orally argued before that court, and, at oral argument, supported Continental's request for determination of Continental's interest in the N½ [of the lease].

Elks Nat'l, 942 F.2d at 1486 (A15). The appellate court succinctly captured the McDonald assignees' position, and why their § 1983 action has no merit, with the following:

> The McDonald assignees confuse process with result.
>
> No denial of due process is shown by the record

> in this case. The district court not only lacked jurisdiction, the substantive position of the McDonald assignees is devoid of legal merit. Under these circumstances, an award of attorney's fees and costs on appeal is appropriate.

Elks Nat'l, 942 F.2d at 1486 (A16).

It should be pointed out that the claims for fees and costs on appeal came to more than $30,311 on over 265 hours of work. The appellate court only awarded $7,741 in fees on appeal (less than one-third of the total) which did not include any of Continental's out-of-pocket expenses in attending oral argument. The claims by the McDonald assignees are frivolous, but nonetheless expensive for the other parties.

V.

JUST DAMAGES AND COSTS SHOULD BE AWARDED AGAINST THE PETITIONERS.

The McDonald assigneees' petition for writ of certiorari is just as frivolous as their complaint in the district court and their appeal to the Court of Appeals for the Ninth Circuit. Under Rule 42.2 of the Rules of the Supreme Court of the United States, "the Court may award the respondent . . . just damages and single or double costs," which may be awarded against the petitioners or their attorney or both. The court should award damages, including reasonable attorney's fees, as well as costs against the petitioners and their attorney.

CONCLUSION

The McDonald assignees' petition for writ of certiorari does not present any special or important reasons for this Court to exercise its discretionary jurisdiction. There is no good reason why this case should be reviewed. The petition should be denied.

The Montana Supreme Court decided the ownership question after hearing and considering and discussing the issues raised by the McDonald assignees. The McDonald assignees then brought an action in the district court under 42 U.S.C. § 1983, to have the Montana court's ruling on ownership reviewed. The district court properly dismissed their complaint for lack of subject matter jurisdiction and imposed Rule 11 sanctions. The United States Court of Appeals correctly affirmed the dismissal and the award of sanctions. The court of appeals also analyzed the substantive position of the McDonald assignees, and correctly found that it has no legal merit. The petition for writ of certiorari is equally as frivolous, and just damages and single or double costs should be awarded under Rule 42.2 of the Supreme Court Rules.

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No. 91-1745

In The
Supreme Court of the United States
October Term, 1991

ELKS, NATIONAL FOUNDATION, A LEGAL ENTITY, ET AL.,

Petitioner,

v.

FRED J. WEBER, ET AL.,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

JUDGES' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a decision of the Montana Supreme Court subject to direct review by a United States District Court?

2. Is it proper to award attorney fees and costs to parties who demonstrate not only that the court in which the action against them was brought lacks subject matter jurisdiction, but also that the substance of the action is wholly devoid of legal merit?

PARTIES TO THE PROCEEDING

Petitioners have identified the parties as set forth in the caption used in the courts below. Among the respondents, Montana Supreme Court Justice Russell C. McDonough is misidentified as "Russell C. McDonald." [Petition at 3]

Additionally, named respondent The Honorable Frank I. Haswell is now deceased. Normally, a deceased public officer's successor is automatically substituted as a party in an appeal. Supreme Court Rule 35.3. Here, no successor exists to Mr. Haswell, a retired Chief Justice of the Montana Supreme Court who sat by designation on the panel that heard the matter. Petitioners brought this action against the members of that panel, rather than the Court as an entity.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is inaccurate and incomplete. The Statement of the Case contained in the Brief in Opposition submitted by the other respondents, Continental Oil Company, Shell Oil Company and Robert Schwinn, serves to set the record straight.

Respondents Montana Supreme Court Chief Justice Jean A. Turnage and Associate Justices John C. Harrision, Fred J. Weber, William E. Hunt and Russell C. McDonough and Temporary Associate Justice Leonard H. Langen, and Montana District Court Judges Joe L. Hegel and Kenneth R. Wilson (collectively the Montana judges) would add that they asserted various defenses when they were brought into this action by petitioners. In their answer to the complaint, they asserted the lack of subject matter jurisdiction, that the claims were barred by the Eleventh Amendment to the United States Constitution and by *res judicata,* that

petitioners were estopped from claiming a due process violation, and that abstention principles precluded relief. The judges moved for summary judgment on each of these grounds.

In granting the Montana judges' motion for summary judgment, Chief United States District Judge Battin initially did not touch on any of these grounds; he relied on petitioners' failure to file a brief that was responsive to the motion. [Order dated October 12, 1989; Pet. Appx. at 47-49.] In a subsequent order, Judge Battin focused on considerations of subject matter jurisdiction, concluding that his court lacked jurisdiction over petitioners' transparent attempt to appeal a Montana Supreme Court decision to Federal District Court. [Order of November 17, 1989; Pet. Appx. at 33-46.]

It should be noted also that in his order of October 12, 1989, Judge Battin declined to award attorney fees to respondents, without comment, although all of them had requested such an award.

Petitioners then asked the District Court to amend that order, insisting among other things that the merits should be reached. This elicited another round of briefs with objections from respondents. Judge Battin revisited the issue in his order of November 17, 1989, and ruled that attorney fees should be awarded because the action was groundless.

The Ninth Circuit agreed that the Federal District Court lacked subject matter jurisdiction. *Elks National Foundation v. Weber*, 942 F.2d 1480, 1485 (9th Cir. 1991). [Pet. Appx. at 10-13.] That Court went on to examine the merits of petitioners' claims to the extent necessary to determine whether the lower court had abused its discretion in awarding attorney fees, and whether fees should be awarded on appeal. Concluding that there was virtually no substantive basis for the Federal Court action, the Court upheld the District Court's award and awarded attorney fees and costs on appeal as well. *Id.*, 942 F.2d

at 1486. [Pet. Appx. at 14-16.]. In its unpublished order setting the amount to be awarded, [Pet. Appx. at 18, 19] the Court of Appeals stated it "decided to award costs and a portion of the claimed fees as a deterrent to subsequent abuses, pursuant to Federal Rules of Appellate Procedure, Rule 38."

ARGUMENT SUMMARY

The other defendants and respondents in the court below, Continental Oil Company, Shell Oil Company, and Robert P. Schwinn, are submitting a separate Joint Brief in Opposition to the Petition. The justices of the Supreme Court of Montana and judges of Montana's Sixteenth Judicial District Court concur with the points and arguments contained in the other respondents' Joint Brief in Opposition, and add their supplemental points and arguments to emphasize the inappropriateness of petitioners' attempt to invoke the jurisdiction of the United States District Court in this matter.

As the Court of Appeals for the Ninth Circuit noted in the opinion below, petitioners' Federal Court action "follows long and colorful litigation in Montana state courts concerning ownership of the working interest in an oil and gas lease in the N1/2 of the NW1/4 of section 8, T7N, R60E, Fallon County, Montana." [Pet. Appx. at 5.] The Court of Appeals, like the United States District Court in the first instance, correctly viewed the Federal Court action as a misguided attempt to continue the state court litigation. Neither the Court of Appeals nor the District Court accepted petitioners' superficial claim of having been deprived of property without due process. This Federal Court action represents nothing more or less than an attempt to have a United States District Court conduct appellate review of a decision of the Montana Supreme Court.

Petitioners have recast their claim in seeking a writ of certiorari. That approach is unavailing because, as the Ninth Circuit recognized, petitioners

in fact received all the process they were due in Montana courts. Petitioners' relentless refusal to acknowledge that fact, coupled with their failure to muster colorable authority for their stated legal theories, brought on the sanctions imposed by the Federal District Court and the Court of Appeals. Petitioners apparently have learned nothing from the lower courts' admonitions, and the Montana judges join with the other respondents in asking this Court to award "just damages and single or double costs" pursuant to Rule 42.2 of the Rules of the Supreme Court of the United States.

ARGUMENT

I. As A Matter Of Settled Law, The Federal Courts Lacked Jurisdiction To Review Montana's Judicial System.

There is nothing unsettled or novel about the legal principles that have been invoked by the Federal Courts to resolve this matter. The complicating factor was described by Judge Battin in

his Memorandum and Order of November 17, 1989, where he remarked, "The procedural posture of this case has been unnecessarily complicated by [Petitioners'] failure to properly distinguish between and address the issues raised by the parties." [Pet. Appx. at 39.] Petitioners are continuing to complicate the procedural posture of this case. Their first "Question Presented" [Pet. at i], is barely intelligible. It seems to refer less to the claim they made in Montana courts and lower Federal Courts, that their title should be measured by a number of documents read together than to the claim they are asserting now, that their title should be measured by a particular document.

In paragraph XIX of petitioners' Federal Court complaint [Pet. Appx. at 241], they acknowledged: "[Petitioners'] claims to title are based, primarily, on a construction of the McDonald assignment according to the usual rules of construction and agreements made after the [1962] assignment by defendant

Continental Oil Company and the McDonald assignees." This acknowledgment mirrored the partial summary judgment ruling petitioners obtained in Montana's Sixteenth Judicial District Court: "This ratification . . . dated May 24, 1962 . . . is the principal source of dispute in these proceedings." [Pet. Appx. at 101.]

The Montana District Court had gone on to rule that the 1962 document was ambiguous, and then turned to a notion of the parties' intent, finding that "[i]t was the intent and understanding of both parties . . . that by the ratification McDonald was conveying 1/2 of whatever he owned in the lease." [Pet. Appx. at 101- 02.] Based on that finding, the Montana district court had concluded, "[T]he parties did not not intend at the time of the conveyance [i.e., 1962] that McDonald convey more than 1/2 of what he owned." [Pet. Appx. at 115.]

That ruling resulted in the Montana Supreme Court's acceptance of supervisory control,

consideration of briefs and oral argument, and ultimate decision adjusting the competing title claims of petitioners and Continental. *Continental Oil Co. v. Elks National Foundation*, 767 P.2d 1324 (1989). As that Court observed, "[Petitioners] argue here, as they did before the District Court, that that the ratification is ambiguous so that a court must look beyond the four corners of the document to interpret it. The Court was not persuaded by that argument in *Gunnip*, nor is it now." [Pet. Appx. at 130.] After quoting a passage from its prior opinion which catalogued the defenses McDonald's assignees might assert to avoid the effect of the 1962 ratification, the Montana Supreme Court reiterated, "Then, as now, we found no ambiguity in the ratification agreement." [Pet. Appx. at 131.]

Again, petitioners acknowledged in their federal court complaint that the 1962 ratification was pivotal. While the Montana District Court had accepted that assertion, and also petitioners'

argument that the 1962 ratification was ambiguous, the Montana Supreme Court had agreed only with the former conclusion.[1] Nor could the Montana Supreme Court agree with the District Court's finding that the 1964 letter and division order supplied evidence of the parties' intent in 1962 [Pet. Appx. at 111], or supported estoppel against Continental. [Pet. Appx. at 113.] Rather, the Montana Supreme Court noted, "We have considered all materials and evidence submitted by [Petitioners], including copies of certain oil division orders and correspondence between Continental and [Petitioners'] attorney. * * * However, we find nothing to indicate that Continental has relinquished its claim to any portion of one half of the working interest in the N1/2NW1/4." [Pet. Appx. at 132.]

---

[1] Petitioners assert that the Court of Appeals was confused about the Montana Supreme Court's decision. Pet. at 14, n.8, but the "confusing language" to which they refer appears only in the publisher's summary of the Ninth Circuit's opinion. That Court's opinion recites the procedural history of the case with total accuracy.

The Ninth Circuit recognized that petitioners' Federal Court complaint had centered on the Montana Supreme Court's interpretations of the 1962 ratification and the 1964 letter and division order. The Court of Appeals' statement that "[t]he Montana Supreme Court did hear and decide the issue of the ambiguity of the ratification agreement," which petitioners now characterize as reflecting a "misunderstanding" of petitioners' position [Pet. Appx. at 29-31], fits the issues petitioners themselves had framed in their action.

Petitioners now assert that the 1964 letter, which they describe in their petition as a "separate, subsequent contract" [Pet. at 7, 8] is the basis for their title claim to get around the Ninth Circuit's holding that Montana courts had considered and decided issues bearing on the disputed title. This shift in emphasis shows that petitioners will stop at nothing to obtain one further opportunity to have their title claim confirmed judicially. It also bears out the

wisdom of the courts below in seeing through petitioners' attempt to invent a frivolous federal claim under Section 1983 to achieve that end.

There is ample authority for rejecting misguided Section 1983 claims. In *Reynolds v. State of Georgia*, 640 F.2d 702 (5th Cir. 1981), for example, a disappointed state court litigant had invoked Section 1983 in an action to recover real property in Georgia. She sought to set aside the Georgia Court's judgment, to enjoin state officers, and to obtain a declaration of her rights and recover damages. The Court of Appeals affirmed dismissal of the action for lack of subject matter jurisdiction, and appended the lower court's opinion to its own. One part of the lower court's opinion, which quotes a passage from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923), is particularly apt:

> Despite plaintiff's portrayal of her dissatisfaction with the Georgia Court's decisions as a distinct injury, it is manifest from the prayers of her

> complaint that she seeks essentially an appellate review of those decisions. "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause . . . ." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 175, 2 L. Ed. 60 (1803), "[T]o reverse or modify [a] judgment . . . would be an exercise of appellate jurisdiction."

Rooker, supra, 263 U.S. at 416, 44 S. Ct. at 150.

Judge Battin cited *Reynolds* in his November 17, 1989, decision. [Pet. Appx. at 42.] The action before him was remarkably similar to *Reynolds;* as in that case the fundamental request was for revision and correction of a state court judgment, and relitigation of the underlying claims in Federal Court.

The difference between a request for review of a state court judgment and a request for vindication of Constitutional and civil rights was not lost on the Ninth Circuit. That Court's opening references to 28 U. S. C. § 1257(a), which provides for United States Supreme Court review of state court judgments, and *District of Columbia Court of Appeals v. Feldman,*

460 U.S. 462 (1983), which reinforces the statutory constraint on federal court appellate jurisdiction, went to the heart of the matter.

The one case petitioners relied on, *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986), did not advance petitioners' spurious jurisdictional claims at all, as the Ninth Circuit noted. ("[Petitioners'] reliance on that case is both misplaced and ill-advised." *Elks National Foundation v. Weber, supra*, 942 F.2d at 1483; [Pet. Appx. at 10]).

There is nothing novel in the Court of Appeals' handling of this case. The lack of federal court jurisdiction was, and is, a matter of settled law.

II. Attorney Fees And Costs Were Awarded Properly In Light Of Petitioners' Abuse Of Judicial Process.

The Court of Appeals did not stop with its conclusion that petitioners had tried to obtain direct review of the Montana Courts, but went on to assess

the substantive basis for such a review. The Court was taking pains to ensure that sanctions imposed by the District Court were appropriate, and to explain the basis for sanctions on appeal.

The Court of Appeals found readily that petitioners had received due process in the Montana judicial system, noting:

> Due process requires an opportunity to be heard in a meaningful manner at a meaningful time. *Parratt v. Taylor*, 451 U.S. 527, 540 (1981), *rev'd on other grounds*, 474 U.S. 327 (1985). It is clear beyond argument that the McDonald assignees [Petitioners] were afforded a meaningful opportunity to be heard before the Supreme Court of Montana on the purely legal issue of the facial ambiguity of the ratification agreement.

Elks National Foundation v. Weber, supra, 942 F.2d at 1486; [Pet. Appx. at 15].

This finding led to the conclusion that petitioners' "substantive position is devoid of legal merit." *Elks National Foundation v. Weber, supra,*

942 F.2d at 1486; [Pet. Appx. at 16]. Petitioners cannot get around this ruling by accusing the Ninth Circuit of having "misunderstood" their position with respect to the ambiguity issue, and asserting that no question of ambiguity in title documents was presented. [Pet. at 29, 30.] As noted above, petitioners had consistently urged the ambiguity of the 1962 ratification agreement, in Montana District Court, in the Montana Supreme Court, and in Federal Courts to this level.

The Court of Appeals' award of attorney fees and costs fits squarely within the scope of Rule 38, Federal Rules of Appellate Procedure. As the Advisory Committee on Appellate Rules noted:

> [C]ourts of appeals quite properly allow damages, attorney's fees and other expenses incurred by an appellee if the appeal is frivolous . . . as a matter of justice to the appellee and as a penalty against the appellant.

This is an appropriate case for the sanctions that have been imposed. Supreme Court Rule 42.2 authorizes further sanctions and, in light of petitioners' failure to substantiate their request that this Court grant certiorari, sanctions should be imposed here as well.

CONCLUSION

This case does not raise an issue that has not been decided by this Court. The Montana judges respectfully request that the Court decline to exercise its discretion and deny the Petition.

Respectfully submitted,

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No. 91-1745

In The

Supreme Court of the United States

October Term, 1991

ELKS NATIONAL FOUNDATION, A LEGAL ENTITY, *et al.*,

Petitioners,

vs.

FRED J. WEBER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PREFACE

Answer briefs to our petition for writ of certiorari have been filed by the respondent judges and justices (judges) and, separately, by Continental Oil Company and the rest of the defendants (Continental). This reply brief is in response to both of those answering briefs.

I. THE COURT BELOW, THE NINTH COURT OF APPEALS, MISCONSTRUED THE CASE OF *ROBINSON v. ARIYOSHI*, 753 F.2d 468 (9TH CIR. 1985).

At pages 16 and 17 of its brief Continental argues that the facts of this case are different from the *Robinson* case and quotes from the distinctions made by the court below.

In the *Robinson* case the Ninth Court of Appeals ruled that the failure of a state supreme court to consider United States constitutional rights in depriving a litigant of property without a hearing (without due process of law) was an adequate basis for a federal district court to enjoin the enforcement of the state court's ruling.

In this case the same Ninth Court of Appeals sought to distinguish the *Robinson* case on the grounds that the *Robinson* case ". . . overturned the existing state water rights system" while this case involved only ". . . well-polished rules of Montana law . . ." (App. 13).

This distinction is pointless. It is none of the federal court's business if the State of Hawaii changes its property laws by legislation, judicial decree or otherwise. It becomes the federal court business, the court in *Robinson* said, if the deprivation of property is affected by court decree and the court refuses to consider the constitutional implications of the taking. It was the

failure of the state supreme court to consider the constitutional implications of its depriving a litigant of property without a hearing that triggered federal court intervention under § 1983. The character and the amount of the property involved is immaterial. That the decree deprived of a litigant without due process of law is decisive.

The *Robinson* case is precisely in point on the principles involved. On appeal of *Robinson* to this Court the applicability of § 1983 was fully briefed and this Court did not rule the lower court to be mistaken on its reasoning with respect to § 1983 but reversed on other grounds. 477 U.S. 902.

The Court of Appeal's failure to follow its *Robinson* ruling is erroneous. Its refusal to set aside the sanctions that were imposed for relying upon that case and its imposition of further sanctions is both erroneous and unfair.

II. TITLE 28 U.S.C. § 1257(a) IS NOT DECISIVE IN THIS CASE.

Both the judges and Continental at page 13 of their briefs argue that the indicated code section is decisive of this case. This code section provides that final judgments of the highest court of the state ". . . may be reviewed by the Supreme Court by writ of certiorari . . .".

We do not believe the indicated statute forecloses us in this case. State "highest" courts can and, in this case, have, denied civil rights to persons protected under Title 42 § 1983. Section 1983 makes no exception for state appellate courts. We suggest it was not the intent of Congress in enacting § 1983 to leave an enclave of state officials who are entitled to disregard federally protected civil rights.

See the case of *Mitchum v. Foster*, 407 U.S. 225 (1972) where this Court held that even a federal statute prohibiting federal courts from enjoining state court proceedings must yield to a § 1983 suit in a proper case. This Court said:

> "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial." Ex parte Virginia, 100 U.S. at 346, 25 L. Ed. 676. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a "suit in equity" as one of the means of redress. And this court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." (Citing cases.) at 242.

While this Court in *Mitchum* was considering § 1983 *vis-a-vis* the anti-injunction statute, Title 28 U.S.C. § 2283, the language used is appropriate to the case at bar.

The court in *Robinson v. Ariyoshi*, 753 F.2d (9th Cir. 1985), held that circumstances parallel to the case at bar constituted a proper case for federal court action under § 1983. Title 28 U.S.C. § 1257(a) was in effect when that ruling was made.

III. THERE IS NO BASIS FOR CONTINENTAL OR THE LOWER COURT TO CLAIM THAT THE McDONALD ASSIGNEES WERE ACCORDED DUE PROCESS OF LAW BY THE MONTANA SUPREME COURT.

At page 12 of its brief, Continental argues ". . . the Montana court heard, considered and even discussed the issues raised and arguments presented by the McDonald assignees, . . .". Variations of this statement are found throughout Continental's brief. The lower court's statement to the same effect is at p. 12 of the appendix. It is true that we weren't prevented from filing a brief in the Montana Supreme Court, not prevented from talking about our case and were not ejected from the courthouse.

However, it is clear that the Montana Supreme Court in plain language explicitly refused to consider any claims of the McDonald assignees other than the claims it had specified in its previous opinion when neither the McDonald assignees nor the letter documents upon which they rely were before the court. The Montana Supreme Court summarily reversed the lower court for giving consideration to anything other than the several previously specified defenses. To argue that the Montana Supreme Court did other than this is to simply refute that opinion (App. 123-135). To say that the Montana Supreme Court "considered" and "heard" the McDonald assignees' claims is belied by the opinion itself.

IV. THE McDONALD ASSIGNEES ARE NOT IN A CLASS OF ". . . EVERY DISAPPOINTED LITIGANT . . .".

On page 17 of its brief, Continental quotes from the lower court opinion, ". . . if McDonalds assignees were entitled to pursue their claim in federal court, every disappointed litigant in a property dispute would contend . . .".

We do not, we believe, fall into the class of ". . . every disappointed litigant . . .". We, clearly, were not granted a hearing on our claim. That we weren't appears from the opinion itself (App. 123-129). Also, we duly objected to such procedure relying on our rights under the federal constitution (Opening Brief, 15-28). Clearly the Montana Supreme Court did not consider our rights, and further, did not pass upon our constitutional objections. We would expect, and hope, that such a situation would be rare but when it does occur we would also expect a § 1983 claim to be heard by a federal court. The hearing of our claim would not open the gates of the federal courts to a flood of disappointed litigants.

V. FAILURE TO APPLY FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT.

Continental notes at page 12 of its brief that ". . . the McDonald Assignees did not appeal the Montana Court's decision to the United States Supreme Court." The Court of Appeals ruled the "McDonald's Assignees' sole avenue for redress in the federal system was a petition for *writ of certiorari* to the Supreme Court of the United States" (App. 13). Whether one has applied for writ of certiorari to the Supreme court is, strictly, irrelevant to the question of whether one has a claim under § 1983. However the reason we did not apply for a writ of certiorari to the Supreme Court of Montana is because the case has never been in a posture where such an application could be made. When the Montana Supreme Court issued its opinion in the case in which it refused to hear our claim it concluded in the following language:

> "We remand to the District Court for entry of judgment establishing the ownership of the working interest in the N½NW½ and for such further preceedings as are necessary and in conformity with this opinion" (App. 134). This

> opinion was handed down January 25, 1989. The lower Montana Court has never entered a final judgment. Of course the constitutional issues which we present in this application have never been finally decided by the Montana district court or considered at all by the Montana Supreme Court. In such a case the state court judgment is not 'final' as required by Title 28 U.S.C. § 1257(a) and an application for writ of certiorari would be premature."

See Uri v. Thompson, 337 U.S. 163; *Schlosser v. Hemphill*, 198 U.S. 173; *Prudential Insurance Company of America v. Cheek*, 252 U.S. 567.

VI. THERE HAS BEEN NO CHANGE IN THE LEGAL POSITION OF THE McDONALD ASSIGNEES.

The main thrust of the judge's brief is found at page 5 where they state "Petitioners have recast their claim in seeking a writ of certiorari." The brief goes on to accuse petitioners of claiming through the appeal to the Court of Appeals that the assignment given by Mr. McDonald was not ambiguous and claiming in this Court under a different theory, that the letter agreement between the McDonald Assignees and Continental Oil Company of 1964 was a "separate subsequent contract."

This statement in the judge's brief is totally inaccurate. *See* our opening brief to the Ninth Court of Appeals at page 7 where the letter agreement is set out verbatim and preceded by the statement:

> After the conclusion of H. W. McDonald's litigation against the McDonald & Eide, Inc., and on July 16, 1984, Continental wrote to H. W.

> McDonald's assignees and agreed with them precisely as to what had been conveyed by H. W. McDonald in the assignment in question.

This agreement was pled and relied upon in state and federal court [Complaint, (App. 161-163)]. The state district court made specific findings as to the existence, validity and conclusive effect of the agreement (App. 102, 111-112, 113). The fact of this conclusive agreement was amply pled and argued but was simply ignored by the Montana Supreme Court and the two federal courts. Had they "considered" or "weighed" it they could not have ruled as they did.

VII. CONTINENTAL MISUNDERSTANDS THE POSITION OF THE McDONALD ASSIGNEES.

At pages 20-21 in its brief Continental argues that ". . .due process guarantee does not ensure against judicial error . . .". We agree with this posit. Our case is not that the Montana Supreme Court erred but that it refused to give us a hearing. If it had, as we show herein, it could not have ruled as it did.

VIII. CONFLICT OF INTEREST

At page 10 of its brief Continental says: "Mr. Huntley has been overpaid as one of the McDonald Assignees and underpaid as one of the receivers assignees."

This is meant to imply that Gene Huntley, counsel herein for the McDonald Assignees, is representing conflicting interests. This implication is inaccurate. There are no claims for damages or for title by the McDonald Assignees against the "receiver's assignees". Neither is there a claim by Gene Huntley as one of the "receiver's assignees" for title or damage against the McDonald Assignees.

IX. OTHER AUTHORITY RELIED UPON BY CONTINENTAL

At page 14 of its brief Continental cites a number of cases for the proposition the United States District Court does not have power to review a judgment by the highest court of a state. None of these cases deal with the situation where the highest court has deprived a litigant of property without due process and refused to consider the constitutional implications of such taking. The only case that we have been able to find on this point is the one that we have cited and relied upon, *Robinson v. Ariyoshi* (which we have already discussed).

Continental also cites and quotes from *District Court of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (Appellant's Brief, 13-14). The lower court also felt that the *Feldman* case was significant and cited and quoted from it (App. 10). Actually in the case of *Robinson v. Ariyoshi*, the case upon which we reply, the *Feldman* case was carefully considered by the Court of Appeals and found not to be controlling (our Opening Brief, 43-54).

X. CONTINENTAL DOES NOT HAVE A DEFENSE TO CLAIM TO THE McDONALD ASSIGNEES.

Continental's defense to the title claims of the McDonald Assignees is that there was a mutual mistake about the quantity of ownership of Eide and Von De Linde when the 1964 letter contract was made and when that mistake was discovered in 1970 Continental was thereby authorized to claim from the McDonald Assignees the share of property it had lost, 1/8, in the suit againt it, Eide and Von De Linde by Gunnip (Continental, 5-6).

This defense to the McDonald Assignees claim does not hold water at all. First of all for the doctrine of mistake to be available

to a contracting party as a defense the mistake must be a mutual mistake.

Although Continental asserts that there was a mutual mistake as to the ownership of Eide and Von De Linde this assertion is not borne out by the evidence before the court. The document which Continental drew and relies upon for its claim of title in these preceedings [ratification and adoption of assignment by Mr. McDonald (App. 199-203)] recites at pp. 201-202 Mr. McDonald's claim that Eide and Von De Linde had no title to the property in question. Also, the party seeking relief on the ground of mistake must bring suit within 2 years under Montana law. *See D'Agostino v. Swanson*, 784 P.2d 919, 923 (MT 1990).

Continental, after discovering its so-called "mutual mistake" in December, 1970, didn't file a preceeding to rectify this mutual mistake within two years or at any time. The contract that Continental entered into with McDonald Assignees was and is binding and enforceable.

This law and circumstance seals beyond any doubt the question of whether the Montana Supreme Court "considered" or "weighed" the claims of the McDonald Assignees. No court could rule for Continental and deprive the McDonald Assignees of their property after giving even scanty consideration to the circumstances and law.

CONCLUSION

The ruling of the Ninth Court of Appeals in *Robinson v. Ariyoshi* is a logical answer to a civil rights law question which has never been answered by this Court, that is, does Title 42 § 1983, give a federal district court jurisdiction when a state supreme court deprives a litigant of property without due process of law (without a hearing) over objections to the taking based upon the United States Constitution? The appeals court in the *Robinson v. Ariyoshi* answered in the affirmative. We suggest the ruling in that case was a just one, in compliance with the intent and language of Title 42 § 1983. Had the Ninth Court of Appeals ruled otherwise in *Robinson v. Ariyoshi* there would be a hole in the fabric of federal civil rights law; there would be an enclave of powerful people whose activities would not be subject to civil rights scrutiny.

We feel also in this case that the fines imposed upon us by the lower courts in excess of $30,000 were cruel and ruinous. No matter how this Court decides the meaning of Title 42 § 1983 we ask these fines be lifted.

Respectfully submitted,

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